PETITION NOT PRINTED

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 590, Misc.

JAMES HENDERSON, Petitioner

v.

THE PEOPLE OF THE STATE OF MICHIGAN

On Petition for Certiorari to the Supreme Court of the State of Michigan

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BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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a

Opinions Below[*]

The opinion of the Michigan Supreme Court is officially reported as *People v. Henderson*, 343 Mich. 465, and unofficially under the same title in 72 N.W. 2d 177. For judicial convenience a copy of such opinion is published herein as Appendix "F," post, p. 57a.

It is also important to note that in the course of 6 years the trial court delivered 3 opinions in which it denied petitioner's motions for new trial:

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[*] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the certified record.

1. An opinion (150) filed February 24, 1948 denied petitioner's first application (97) for new trial presented pro se October 23, 1947 and based on a claim that in proceedings which led to his plea of guilty and a sentence to life imprisonment on a charge of common-law rape, (a) he was not indicted by a grand jury, or (b) accorded a jury trial, or (c) informed of his constitutional right to the advice, aid and assistance of counsel.[1]

2. An opinion (117) handed down Jan. 20, 1953 denied petitioner's second motion (104) for new trial filed by his present counsel June 24, 1952 chiefly on the ground that the plea of guilty entered by the accused was without benefit of counsel and induced by fear of mob violence. A copy of such opinion is printed in this brief as Appendix "D," post, p. 37a.

3. A second opinion (165) filed May 4, 1954 denied the same motion (104) for new trial after hearing testimony (127-149) pursuant to an order (163) of the Michigan Supreme Court remanding the cause for the purpose of resolving the factual issues involved. Appendix "E," post, p. 48a, is a true copy of such opinion.

b

Jurisdiction

We concede that the petition for certiorari was filed within the period of time prescribed by law. Revised Rule 22, § 1.

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[1] Petitioner did not claim that his confession and plea were obtained by means of threats, intimidation, or coercion, or that he pled guilty or confessed through fear of mob violence.

c

Constitutional Provision Involved

The only constitutional provision involved in this controversy is, if applicable, the Due Process Clause of the Fourteenth Amendment.

d

Questions Presented

Five years after pleading guilty to a charge of rape and being sentenced therefor to life imprisonment,[2] petitioner prepared and filed pro se a delayed motion for new trial.[3] He claimed inter alia that in such procedure his federal constitutional right to assistance of counsel had been infringed.[4] This motion was denied and no appeal was taken. Five years later, through present counsel, petitioner filed a second motion in which he asserted for the first time that his confession and plea of guilty had been induced by police threats, coercion and intimidation and by his fear of threatened mob violence. Such claims were refuted by sworn testimony of witnesses at a hearing on his motion and by

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[2] In Michigan the offense of rape is not a capital crime but upon conviction is punishable by imprisonment for life or any number of years. Mich. Penal Code, § 520 [Comp. Laws Mich. 1948, § 750.520 (Mich. Stat. Ann., 1954 Rev. § 28.788)].

[3] In a supporting affidavit (R. p. 102), Henderson explained such delay by stating that at the time of his conviction he was without knowledge of law or his constitutional rights. Meanwhile he had learned to prepare his application and had studied the law applicable to his case.

[4] Other grounds asserted were that petitioner had not been indicted by a grand jury or tried by a petit jury. He claimed no coercion or fear of mob violence.

petitioner's own inconsistent statements. As in the case of Quicksall,[5] the trial judge, after hearing witnesses and carefully reviewing their testimony, "took no stock in the reconstructing memory of the petitioner and denied his motion." The Supreme Court of Michigan affirmed.

1. Did the fact that the entire procedure, from arrest at 7:30 p.m. to arraignment, plea and sentence at 10:30 p.m. during a specially-convened session of the trial court, was concluded within 4 hours, in the circumstances of the case, constitute a denial of due process of law under the Due Process Clause of the Fourteenth Amendment?

2. Did the Supreme Court of Michigan decide a federal question of substance not heretofore determined by this Court or in a way probably not in accord with applicable decisions of this Court, and are there special and important reasons for granting the writ?

e

Concise Statement of the Case

We deem it necessary to make the following statement to correct a few inaccuracies and omissions in that of the petitioner:

1. On pages 5 and 6 of the petition it is asserted that "at no time was petitioner advised of his right to counsel; nor was he represented by counsel." To this we would add that Officer Campbell testified (26) that the chief of police asked petitioner if he had an attorney or wanted an attorney, and the accused said "no, he would like to get it over with as soon as possible."

[5] Quicksall v. Michigan, 339 U.S. 660.

2. It is said, petition, p. 6, that upon arraignment in open court "petitioner admitted his guilt and was questioned concerning the circumstances of the alleged crime." It should be added that the trial judge was also meticulous in his investigation to determine whether the plea of guilty offered by the accused was voluntary.[6] The information having been read (127-128), petitioner replied in answer to questions from the bench, that he understood with what he was charged; that he pled guilty of his own free will; that no one had threatened him or beaten him up or promised him anything to get him to plead guilty. Questioned by an assistant prosecuting attorney, petitioner stated he had first seen him in the county jail that night, in the cell over there (137). He said that the prosecutor asked him if he wanted to tell all about it and he told him yes. He was in his cell and the prosecutor was outside. After that they went into the office of the police chief where the prosecutor asked him if he wanted to make a confession and explained to him his constitutional rights and told him he did not have to make a statement (138). All statements signed by him were free and voluntary and made with his knowledge that they could be used against him. He wanted to make a complete confession and get the matter over with. The prosecuting attorney also informed him no threats or promises of any kind or nature could be made to him or offered to him to get him to make that statement. No such tactics were used. No hand was laid on him at all by any police officer or any law-enforcement agent.[7]

Questioned regarding his knowledge of the seriousness of what he had done, the accused replied, "somewhat, sir,"

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[6] The complete transcript of arraignment is set forth in our Appendix "A," post, pp. 1a-26a.

[7] It is only fair to note that in quite a number of instances answers of accused were "yes," or "no," to leading questions.

and he said he was ready for anything that was supposed to come to him (145) but he did not know it carried a life sentence; he did not know that but he had some idea what kind of sentence it carried. But the fact that the offense carried a life sentence would make no difference in his plea. "I wouldn't change my plea," he said, "because I know I am guilty; no use trying to run around—trying to fight it."

Finally, under examination of the court (147), the accused related the following circumstances of his previous arrest, plea and conviction in a Detroit court on the charge of robbery-armed:

> "That is the first time I was ever in jail in my life. I didn't know just what to do at the time. They carried me back and took me out and talked to me and carried me back again and called me out and talked to me and talked to me again and they carried me in a little room and I got afraid and pleaded guilty and they carried me to Central Station about nine that morning and I changed my plea to not guilty and they sent me State's attorney and he listened to the case and told me to plead guilty and I would get off easy and I did plead guilty and (the court) sentenced me from one to ten (years)."

3. On the 23rd day of October, 1947 petitioner filed in circuit court an application for leave to file a "delayed motion for new trial" (97), explaining in his supporting affidavit (102) that the reason for such a long delay was because

> 'at the time of his conviction he was then without knowledge of law or his constitutional rights, and further without the assistance of legal counsel, he did not know that there was such a thing as redress for

him. Due to this fact he had to learn how to prepare this application, and to study the law applicable to his case, and that this was not learned until this date, whereupon he did after learning start proceedings to obtain his constitutional rights."

In such application (97-101) petitioner stressed the following points (and no others), summarized as follows:

(a) It appears that the respondent "did not know the full consequences of the plea of guilty" (98).

(b) The accused was not indicted by a grand jury as required by the 5th Amendment to the Constitution of the United States and the trial court therefore had no jurisdiction (99); moreover, certain statutes of the State of Michigan permitting criminal prosecution by information, are unconstitutional and void (100, 101).

(c) Under the Federal Constitution "there is no such thing as a plea of guilty to any crime" (100).

(d) It further appears from an opinion (150) of the trial judge denying such motion, that petitioner had claimed in connection with his arraignment, plea and sentence that he had been deprived of his constitutional right to the aid and assistance of counsel, and that he had relied upon this Court's decision in *De Meerleer v. Michigan*, 329 U. S. 663.

The trial court in such opinion went to great length in reviewing decisions of this Court and thereby distinguishing the facts at bar from those involved in *De Meerleer, supra.*[8]

4. On page 8 of the petition for certiorari, counsel quotes in part from certain statements made by the circuit judge during the first hearing on petitioner's second motion

for new trial (Appendix "B," post, p. 26a), concerning the practice said to have been widespread 10 or 20 years ago of holding court at any time of the day or night at the convenience of public officials, witnesses and interested parties. Since counsel claims much for these remarks, taken out of context, we deem it helpful to supply the entire statement (13-14) as our Appendix "C," post, pp. 33a-37a.

5. We deem it essential to summarize portions of the testimony bearing upon petitioner's claim that his confession and plea of guilty were induced by fear of mob violence:

a. In his second motion for new trial petitioner alleged (Appendix "B," post, p. 31a) that at approximately 9:00 p.m., to the best of his knowledge and belief, he was taken out of his cell in the jail and "led through a tunnel from the jail to the . . court house and there taken by elevator to the 9th floor where he was brought into the court room of Judge Spier." Further "that a police officer on such occasion told him to look out of the window to the street below, that a mob had gathered and that he would be turned loose to the mob if he did not confess. That he did look through the window and saw a large number of people below, some of them looking up in his direction."

Concerning the tunnel incident, Henderson testified (43-44) that while he had believed this to be a fact when he signed his supporting affidavit, he had discovered that such a tunnel did not exist (44) and he was therefore honestly mistaken.

Henderson also testified (40-41) the reason he signed the

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[8]
Other questions raised were apparently unworthy of discussion. The claim that prosecution was by information instead of indictment is met by Hurtado v. California, 110 U.S. 516.

confession was out of pure fear that they would turn him over to the mob, though at that point he hadn't seen any mob, but he feared a mob because he was a colored fellow known to have been "fooling with this white woman, irregardless whether it is rape or not" and there was talk of mob violence; so he was scared.

Petitioner further testified (45) that while in the courtroom awaiting arraignment, police officers told him to go to a window and look out and he could see the mob down there, so he walked over with one of the officers to the back window and looked down into the street and he did see some people down there though he could not tell what they were doing.

On cross-examination, however, he stated (52) he never claimed to have seen a mob. He couldn't tell the exact number of people he saw on the sidewalk but that scared him.

Eugene Smith and Stanley Campbell, Mount Clemens police officers who took custody of the defendant from the state police at approximately 7:30 p.m. on August 5, 1942, and maintained it until 11:30 p.m. when they delivered him to the Pontiac jail, denied (16) there was any mob or threat of mob violence or that defendant was taken to the window in the courtroom or that he was near the window. They admitted that the chief of police had expressed fear of mob violence, and that the reason for the night proceedings and the transfer of defendant to the Pontiac jail was the fear by the police chief of mob violence. However, they denied that the defendant was advised of the police chief's fear of mob violence. Officer Smith admitted that in 25 years he had never known of a case where proceedings of this kind had taken place.

Smith further testified (17) that there had never been a tunnel from the jail to the courthouse; that officers walked

the defendant across a wide street (from jail to courthouse); that there was no unusual or extraordinary precaution taken; that there was no mob or gathering of persons visible; and that the courthouse was open and he took the defendant up on elevator to the third floor.

He also testified (17-18) that at some time during the proceedings, he did not recall just when, or whether it was after the arraignment or before or during, Chief Rosso said he was afraid that a mob might possibly gather.

Harold R. Carroll, who was an assistant prosecuting attorney in 1942, testified (29) that on the night of August 5th, someone at the county jail mentioned that the Henderson case was being heard, that he walked to the county building which was open; that the door to the courtroom was open, and the witness entered the courtroom a few minutes before court was convened. He saw no threats made against the defendant nor did he see defendant walk to any window in the courtroom and he observed no gathering of persons or threat of mob violence nor did he observe extra policemen around the county building or jail. Carroll further testified (29-30) that he left the county building after the hearing, walking with the chief of police, directly behind the defendant, and that the chief told him he wanted to avoid any possibility of trouble from any group or mob, but that the chief's remarks were not within hearing of the defendant.

Edgar R. Racine, who in July and August was a reporter for the Mt. Clemens Monitor Leader, testified (30-31) concerning interviews he had with the chief of police and newspaper articles he had written on the subject of threatened mob violence.

This witness testified (30) that in July and August 1942 he was a reporter for the Mt. Clemens Monitor Leader, that

he wrote an article which appeared in that newspaper on July 31, 1942 under the heading "Press Search for Attacker", that the following statement which appeared in the article written by him and printed in the paper must have been based upon a statement made to him by the chief of police. "As a matter of fact, I can't now recall Mr. Rosso having said that to me, but we printed it in the paper at that time and to this reporter he obviously must have said it." "He wouldn't have quoted him unless he had said it".

> "Meanwhile, Rosso said that a half-dozen irate Harrison township men—neighbors of the woman—visited the jail last night where they threatened to avenge the crime. 'If you've got that ——— ——— ———, we want him.' Rosso quoted them as saying."

He further testified that he was unable to identify the reporter who had written the article which appeared in the August 6, 1942 issue of the paper. This article contained the following statements:

> "Moving with lightning rapidity to avoid possible mob violence, and at the same time, mete out swift justice, Mount Clemens courts and law enforcement officers combined late last night to send a 27-year-old Negro to prison for the rest of his natural life following his confession to having twice attacked a 26-year-old white Harrison township housewife.
>
> "To minimize the possibility of violence the man, James Henderson, was rushed to Pontiac for safekeeping overnight and was picked up there for Macomb County Deputy Sheriffs this morning for transfer to the Southern Michigan Prison at Jackson.
>
> "Held, and Police Chief Arthur I. Rosso, both said that rumblings indicated possible violence from in-

censed Harrison township acquaintances of the outraged white woman had prompted them to rush through arraignment and sentence of the confessed attacker."

He further testified that he made no investigation of the above information and had no personal knowledge of mob violence or threats thereof other than the statement made to him by the police chief; that during the time he was a police reporter for the paper from the years 1939 to 1943 he did not cover any case in which there was mob violence."

The trial judge, upon due consideration of all the testimony, and having read briefs filed by the parties, handed down an opinion (117-123) and a supplemental opinion (123-124) in which he denied defendant's motion for new trial.

We publish as Appendix "C," *post*, p. 37a, a true copy of said opinion and supplement including copy of transcript of arraignment, plea and sentence, attached thereto.

f

Reasons for denying Certiorari

1. **There are no special and important reasons for a review on certiorari.**

2. **The court below has not decided a federal question of substance not heretofore determined by this Court, nor has it decided such a federal question in a way probably not in accord with applicable decisions of this Court.**

Petitioner's claim of denial of due process is predicated upon his assumption or allegation that a confession was

procured from him by police officers through threats of imminent mob violence, followed by an inordinate administration of "quick justice" which culminated at about the hour of 10:30 p.m. in an involuntary plea of guilty to a charge of rape, Penal Code, § 520 [CL 1948, § 750.520 (Stat Ann 1954 Rev., § 28.788)] and a sentence to life imprisonment imposed upon a helpless colored man. It is further contended that the night-court arraignment of the accused was in violation of the State Constitution, 1908, Article II, § 19, which guarantees, among others, the right to a public trial.[19]

Of course, if the record in this cause established beyond reasonable doubt that the accused was persuaded by police officers to confess his guilt by deliberately putting him in fear of threatened, imminent mob violence, if it further appeared that he was later forced against his will to waive a preliminary examination before a magistrate called to the city jail for that express purpose, if the weight of evidence clearly showed that at a late hour of the night the prisoner was taken through a tunnel from jail to county building and thence in an elevator to a third-floor courtroom for the purpose of arraignment, guilty plea and sentence, if it were further disclosed that while waiting the appearance of the circuit judge, the defendant was taken to a window and shown a crowd of people on the sidewalk of the street below (said to be a mob), thus continuing the pressure upon him, and that shortly thereafter in open court the accused pled guilty to the charge set forth in the information, any court would hold that due process had been denied. The climate of the proceedings would tend to support such a claim. — It would also, we respect-

[19] While it is said that petitioner pled guilty without counsel, we find in his brief no emphatic claim that he was denied counsel or that he should have been advised of his right to counsel.

fully submit, form a breeding ground for subsequent perjury on the defendant's part some 10 years later, which is precisely what the trial judge found when upon hearing the testimony he "took no stock in the reconstructing memory" of the defendant Henderson, "and denied his motion" to vacate his plea,

Quicksall v. Michigan, 339 US 660, 665.

First: The mere fact that an accused is under arrest at the time of confessing is not of itself sufficient to exclude such a confession.

Sparf v. United States, 156 US 51, 55;
Pierce v. United States, 160 US 355;
United States v. Carignan, 342 US 36, 39.

In the case of *Sparf, supra*, the Court said:

"It is true that the fact of a prisoner being in custody at the time he makes a confession is a circumstance not to be overlooked, because it bears upon the inquiry whether the confession was voluntarily made or was extorted by threats or violence made under the influence of fear. But confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises."

And in *Carignan*, 342 US at 39, the Court said:

"So long as no coercive methods by threats or inducements to confess are employed, constitutional requirements do not forbid police examination in private of those in lawful custody or the use as evidence of information voluntarily given."

According to officers in charge, Henderson entered the Mt. Clemens city jail at 8:30 p.m. and he made his confession to an assistant prosecuting attorney at 9:30 p.m. According to his own testimony he was brought to the jail at dusk, registered and fingerprinted and taken to a cell where he remained for a period of time when he was brought into the offiice and questioned.

Whatever the truth may be with regard to Henderson's claims of coercion, it cannot be said that the short, hour-long period of questioning to which he was subjected before confessing in the jail, of itself resulted in denial of due process.

Second: Nor does this case come within range of recent decisions holding that confessions procured by repeated, or protracted, unrelenting inquisitions by police officers (sometimes working in relays) of prisoners without friends or counselors present, and under circumstances calculated to inspire terror, are compulsory and therefore inadmissible,

Chambers v. Florida, 309 US 227;
Ward v. Texas, 316 US 547;
Ashcraft v. Tennessee, 322 US 144;
Haley v. Ohio, 332 US 596;[10]
Watts v. Indiana, 338 US 49, 53;
Turner v. Pennsylvania, 338 US 62;
Harris v. South Carolina, 338 US 68.

And many of such decisions refute appellant's contention that the mere speed with which he was brought before a magistrate and arraigned to the information, constitutes a denial of due process.

Thus, in *Ward v. Texas, supra*, 316 US 547, the evidence

[10] With which compare Lyons v. Oklahoma, 322 US 596, 601, 602.

showed that the arrest of the defendant was illegal, being effected without a warrant by a sheriff from another county, "*that the defendant was not taken before a magistrate*," that, instead, he was removed to a county more than 100 miles away, and for three days was driven from county to county, that during all this time he was questioned continuously by various officers who told him of threats of mob violence and that there was little probability of mob violence, as claimed by such officers, justifying the removal of the defendant outside the county.

The confession in *Asheraft, supra*, 322 US 143, was deemed involuntary and its use a denial of due process because the uncontradicted evidence, *inter alia*, disclosed that the petitioner had been held incommunicado for 36 hours, during which time without sleep or rest, he had been interrogated by relays of officers and investigators. In the words of the Tennessee Supreme Court, quoted at page 149 of the United States Supreme Court opinion:

> " 'It appears that the officers placed Asheraft at a table in this room on the fifth floor of the county jail with a light over his head and began to quiz him. They questioned him in relays until the following Monday morning, June 16, 1941, around nine-thirty or ten o'clock. It appears that Asheraft from Saturday evening at seven o'clock until Monday morning at approximately nine-thirty, never left this homicide room on the fifth floor."

Testimony of the officers also showed that the reason they questioned Asheraft "in relays" was that they became so tired they were compelled to rest. But from 7:00 Saturday evening until 9:30 Monday morning Asheraft had no rest.

In *Watts v. Indiana, supra*, 338 US 49, the petitioner was

arrested on suspicion on a Wednesday and held *without arraignment*, without the aid of counsel or friends and without advice as to his constitutional rights, until the following Tuesday, when he confessed to murder. Meanwhile he was held much of the time in solitary confinement in a cell with no place to sit or sleep except the floor and was interrogated by relays of police officers, usually until long past midnight. It was held that the use at the trial of a confession obtained in this manner violated the Due Process Clause and the conviction was reversed. It should be noted that Mr. Justice Frankfurter, in announcing the judgment of the Court, id., p. 53, said:

> "Although the law of Indiana required that petitioner be given a prompt preliminary hearing before a magistrate, with all the protection a hearing was intended to give him, the petitioner was not only given no hearing during the entire period of interrogation but was without friendly or professional aid and without advice as to his constitutional rights. Disregard of rudimentary needs of life—opportunities for sleep and a decent allowance of food—are also relevant, not as aggravating elements of petitioner's treatment, but as part of the total situation out of which his confessions came and which stamp their character."

And opinions filed in *Turner*, 338 US 62, and *Harris*, 338 US 68, which followed *Watts, supra*, stressed the fact that the accused had been held on suspicion without preliminary hearing before a magistrate, and questioned for days by relays of police officers.

It is also interesting to note that other decisions of this Court follow the rule that confessions are improperly admitted where they are the plain result of holding and interrogating persons without carrying them forthwith before

a committing magistrate as the law commands,

McNabb v. United States, 318 US 332;
Upshaw v. United States, 335 US 410;
Cf. *United States v. Mitchell*, 322 US 65, 69.

The *McNabb* rule, however, is based upon a command of Congress, 18 USC § 595, that "it shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial." It is not a limitation imposed by the Constitution and is not applicable to trials of cases in state courts,

Gallegos v. Nebraska, 342 US 55, 63, 64;
Brown v. Allen, 344 US 443, 476.

Michigan, of course, has the same statutory rule for the guidance of officers who make an arrest on warrant issued for any offense not cognizable by a justice of the peace. Code of Criminal Procedure, Chapter 4, § 8 [CL 1948, § 764.8 (Stat Ann 1954 Rev § 28.867)]. And under its precepts it became the duty of the officers who arrested Henderson on warrant to bring him promptly before the magistrate. It cannot, we think, be said that speed in the administration of justice denied Henderson due process of law.

Nor can it be said that the defendant at bar was subjected to the type of interrogation condemned by this court in the extreme cases cited above.

Counsel for petitioner, however, cites an earlier decision of this Court to support his position that the speedy proceedings in this case constituted a denial of due process,

Powell v. Alabama, 287 US 45, and a case there cited,
Commonwealth v. O'Keefe, 298 Pa 169;
Cf. Reliford v. State, 140 Ga 777.

The facts in *Powell* need no restatement here. The applicable rule laid down by Mr. Justice Sutherland in the Scottsboro rape case is that a defendant, charged with a serious crime, "must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense."

The decision in *Commonwealth v. O'Keefe, supra*, 298 Pa 169, cited in *Powell*, at p. 58, reversed a conviction where a person indicted for the alleged possession of liquor was tried and convicted 5 hours after his arrest, and after a continuance was refused to enable his counsel to prepare for trial.

In the case at bar, if our view is correct, the accused freely, voluntarily and understandingly elected to plead guilty and of course he asked for no continuance in order that he might prepare for trial.

For a helpful treatise on the subject, "Federal Review of Coerced Confession Cases," see the Spring 1955 issue of the Arkansas Law Review and Bar Association Journal, p. 130.

Third: Before presenting to this Court the question involving defendant's credibility as a witness, it should be noted that in nearly all the cases so far cited in this brief, decision has been based upon undisputed facts; and while this Court has reserved to itself the privilege of independent judgment, it has also held that when the issue as to whether confessions were coerced has been fairly tried and reviewed by the courts of a State, and there is no indication that constitutional standards of judgment have been disregarded,

the Court will accept the State's determination of the issue, in the absence of impeachment by conceded facts,

Stein v. New York, 346 US 156, 180-182;
Cf. *Legra v. Denno*, 347 US 556.

A portion of the opinion written by Mr. Justice Jackson in *Stein*, is worthy of quotation here:

> "It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if they do, that cause us to intervene to review, in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a state court.
>
> It is common courtroom knowledge that extortion of confessions by 'third-degree' methods is charged falsely as well as denied falsely. The practical problem is to separate the true from the false. Primary, and in most cases final, responsibility for determining contested facts rests, and must rest, upon state trial and appellate courts.
>
> A jury and the trial judge—knowing local conditions, close to the scene of events, hearing and observing the witnesses and parties—have the same undeniable advantages over any appellate tribunal in determining the charge of coercion of a confession as in determining the main charge of guilt of the crime."

Fourth: And before considering the factual issues involved in defendant's claim of a coerced confession and plea, we feel we should answer his independent contention that he was denied a public trial because the arraignment proceedings were held at 10:30 o'clock in the evening.

The Michigan Supreme Court has since its early history honored the right of prisoners to a fair and public trial and to protection against oppressive and irregular action,

Sarah Way's Case, 41 Mich 299, involving the power of a police justice to hold sessions at station houses.

Thus, an order by the court in a criminal case, directing an officer to stand at the door of the courtroom "and see that the room is not overcrowded, but that all respectable citizens be admitted and have an opportunity to get in when they shall apply," was deemed to violate the right of the respondent to a public trial, guaranteed to him by § 28, Article 6 of the Constitution of 1850,

People v. Murray, 89 Mich 276.

And in a later case,

People v. Yeager, 113 Mich 228,

a local act of 1893, No. 408, § 18, authorizing the judge of the recorder's court of the city of Detroit to exclude from the courtroom, upon the trial of any cause wherein evidence of licentious, lascivious, degrading, or peculiarly immoral acts would be given, all persons except those necessarily in attendance, was held invalid as applied to a criminal case, in that it violated the right of the accused to a public trial.[11]

This rule, however, does not bar the exclusion of witnesses from the courtroom during progress of a trial,

People v. Martin, 210 Mich 139,

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[11] The Court's decisions in Murray and Yeager were based upon the same principle which recently guided the New York Court of Appeals in People v. Jelke, 308 NY 56.

nor does it operate to forbid the stationing of a court officer outside of the door of the courtroom to take the names of persons attending a murder trial and search them for concealed weapons. Such a procedure is not open to the objection that defendant was thereby deprived of such an open and public trial as is guaranteed by the State Constitution, where such an incident was not known to the jury, and no one was excluded from the trial.

People v. Mangiapane, 219 Mich 62.

On the other hand, it has been held that closing the doors of a courtroom during the judge's charge to the jury, violates the constitutional guarantee of public trial.

People v. Micalizzi, 223 Mich 580.

Be that as it may, however, we find no decisions of this or any other court of appellate jurisdiction, nor has counsel cited such a case, holding that a court night-session convened to arraign an accused person to an information charging felony, in itself deprives him of his right to a public trial.

The Michigan Supreme Court has declared that as a general proposition it does not approve of court proceedings held in the early hours of the morning, but it has held that such a procedure in itself does not deny due process of law.

People v. Coates, 337 Mich 56, 78; cert. denied, 346 US 840.

When Henderson's second motion for new trial was first heard in June 1952, before testimony had been taken on remand, the trial judge made a statement in which he deplored the practice of night-court sessions in criminal cases which existed in Macomb county and elsewhere some 10 to

20 years ago but which had ceased in his circuit. He also said:

> "Now, the purpose back of that (practice) was purely one of disposing of the case promptly; secondly, for the reason that it is a known fact that a party arrested and accused, associating over in jail any length of time with more experienced criminals, very often was talked into fighting the case regardless whether he was guilty or innocent, and very often advised that it cost him nothing to put up a fight, why plead guilty, the state will appoint an attorney. It resulted many times in trials that resulted in the same net result, except that it was at considerable more expense to the taxpayers and no injustice, to our knowledge, was incurred other than . . . well I can't say no, because there have been cases before me that I have set aside because I was satisfied that the respondent did not know his full rights, he had not had experience before, or for some reason I was not satisfied that the plea was free and voluntary."

Stripping a few phrases from the context of this statement, counsel would infer that in the case at bar, a night session of circuit court was held for the express purpose of preventing withdrawal of defendant's plea of guilty at the expense of the taxpayers of Macomb county. But in view of the court's scrupulous regard for the rights of any accused who might establish coercion in compelling his plea of guilty, the inference is not fair. It cannot be said that in the case of Henderson, a night session of court was held for the purpose of saving the money of the taxpayers.

Fifth: A correct judicial answer to the question for decision here depends in the final analysis upon the credibility

of Henderson who testified in support of his motion to vacate his plea of guilty more than 10 years after the event. The circuit judge, in the language of Mr. Justice Frankfurter in *Quicksall v. Michigan*, 339 US 660, 665, "took no stock in the reconstructing memory of" the defendant and denied his motion. In a carefully considered opinion, published as Appendix "E," *post*, p. 48a, Judge Spier reached the conclusion that defendant's testimony, as well as the allegations of his affidavit, was pure fabrication, and he refused to give credence thereto. We respectfully submit the court below was justified, and that his finding should be sustained.

1. Unlike numerous cases decided in recent years by this Court, which we have cited by way of contrast, counsel does not claim that Henderson was held incommunicado for days and subjected to torture, or to protracted interrogation, until finally under such compulsion he broke down and confessed his crime. Nor is there any testimony to that effect.

Defendant's claim is based solely upon the alleged fact that fearing mob violence he pled guilty after making a confession in the jail.

The plea of guilty here challenged was offered to the court on the 5th day of August 1942. The current theory is that because of threats of mob violence, defendant was hustled away to Pontiac at midnight, held there until the next morning, then transported to the Michigan state prison at Jackson.

Five years later, on the 20th day of October 1947, he filed in circuit court his application for leave to file a delayed motion for a new trial (97). Yet, in this motion, and in other papers filed during the 10-year period, no claim was

made that defendant had pled guilty in fear of mob violence. As the trial judge so aptly stated (119):

> "Prior to June, 1952, and for this entire ten year period from date of sentence, (lacking forty-two (42) days) the defendant did not at any time, nor in any papers filed with this court, claim to this court that he was innocent, or claim that he was not guilty, nor did he at any time in that period claim to the court that his plea of guilty had been entered by reason of any fear or intimidation.
>
> "This court has read and reread every paper filed during that ten year period by the defendant or by his counsel and nowhere do any of them make any claim that the defendant entered his plea by reason of any fear or intimidation or threats of violence or mob violence, nor was any reference made to any such thing as a mob, nor does a careful perusal of all of these papers filed by the defendant in that ten year period discuss any claim or even an intimation that the defendant was not guilty of the offense to which he pleaded guilty.
>
> "In fact, the opposite can almost be inferred from the papers filed.
>
> "The entire claim and the theory of the defendant and his counsel during this ten year period was only that he had been denied his constitutional rights in that he was not represented by counsel at his arraignment."

The court below also noted that during the 1948 arguments for new trial no claim was made that the defend-

ant was not guilty, or that his plea was entered through intimidation or fear.

The motion for new trial (104-110, appendix "B," *post*. p. 26a) heard upon remand, filed June 24, 1952, 10 years after arraignment, plea and sentence in 1942, was supported by the affidavit (107) of Henderson, alleging for the first time that he did not commit any offense and that he pled guilty because of fear of a mob in the street. Commenting upon this affidavit, the trial judge had this to say (121):

> "This affidavit is of considerable importance and has been skillfully prepared, but has been built around certain facts which this court knows are false and must take cognizance of.
>
> "The defendant swears he was taken out of the cell and led through a tunnel from the jail to the Macomb County courthouse. This is false. There is no tunnel of any kind. The jail is diagonally across a main downtown intersection from the county building. The only way prisoners can be brought over to court are out through the front entrance of the jail on the main street and across the main public walks and street intersection. Whoever prepared this part of the affidavit obviously must have had in mind the Detroit Recorder's Court arrangement, where a tunnel is used to walk prisoners from the jail or police headquarters to the Recorder's Court rooms.
>
> "Furthermore, the affidavit states the affiant looked out of the court windows to the street below and saw a "large number of people below, some of them looking up in his direction." Because of abutments it is physically impossible to see the street or sidewalks from the court room windows where defendant was arraigned,

with the exception of one window from which can be seen the intersection of streets and sidewalk located one block west of the intersection on which the jail is situated. *Neither the jail, nor street intersection located there, nor the sidewalk between the jail and the main entrance of the county building, can be seen from this one and only unobstructed window.*"

The court concluded that the allegation of the existence of a mob was a fabrication built upon a newspaper article (115-116).

2. Henderson's own testimony on the subject of mob violence, when summarized runs something like this:

On the way from the state police barracks at Redford to Mt. Clemens, the officers who had him in custody told Henderson they were afraid of mob violence (37). This is categorically denied by the officer (25).

He further stated that when questioned by police officers at the jail (38-39) the latter said they would not be responsible for him "if the mob breaks in" and they were not going to lose their lives protecting him (39). This also was denied (17).

Although he testified (40-41) that he had confessed out of pure fear of a mob, and out of apprehension that he would be turned over to it, he had not seen a mob from the jail because he could not see out (41). While he saw a number of people down on the street when he looked out the court room window, he could not tell the exact number, though that scared him (52-53). The officers, however, denied the window episode (17). And the court in his first opinion said (Appendix "D," post, p. 43a):

"Furthermore, the affidavit states the affiant looked

out of the court windows to the street below and saw a "large number of people below, some of them looking up in his direction." Because of abutments it is physically impossible to see the street or sidewalks from the court room windows where defendant was arraigned, with the exception of one window from which can be seen the intersection of streets and sidewalk located one block west of the intersection on which the jail is situated. Neither the jail, nor street intersection located there, nor the sidewalk between the jail and the main entrance of the county building, can be seen from this one and only unobstructed window.

Had there been any unusual number of people interested, there was nothing to stop them from coming into the building or the courtroom. All doors were unlocked and an elevator was running for public use, as other public gatherings were going on in the building. Defendant's affidavit itself indicates that only the usual group customarily found present at arraignments, even at morning or afternoon sessions namely, newspaper men and court attendants, were in attendance."

3. The source of speculation over the possibility of mob violence may be found in a local newspaper article published July 31, 1942, some time prior to defendant's arrest (30), and which included the following:

> "Meanwhile, Rosso (Mt. Clemens Chief of Police) said that a half-dozen irate Harrison township men —neighbors of the woman—visited the jail last night where they threatened to avenge the crime. 'If you've got that —— —— —— ——, we want him," Rosso quoted them as saying."

When, after the lapse of 10 years, Henderson got around

to the preparation and filing of his motion for new trial, Chief of Police Rosso was dead. Other officers, however, testified the chief had expressed fear of mob violence (18); they admitted it was because of such fear that night-court proceedings were held and the prisoner was then transferred to the Pontiac jail. But they further testified (18-19) that no unusual or extraordinary precautions were taken; that they walked the accused from jail to county building across a wide street; that there was no mob or threat of mob violence that night; they denied that Henderson was taken to a courtroom window to view a crowd on the street; they denied that defendant was advised of the police chief's fear of mob violence; and they stated there was no mob or gathering of persons visible. Nor was there any mention in their presence of a mob (18-19). In short, nothing was said to Henderson about a mob (24).

4. We publish as Appendix "A," post, p. 1a, a complete transcript (127-149) of the proceedings had upon the arraignment, plea and sentence of the defendant on the 5th day of August, 1942. This will demonstrate that the accused was interrogated by the circuit judge concerning the voluntariness of his plea; that he stated to the court he pled guilty of his own free will without threat or promise; and that he told a detailed, circumstantial story of the events of the evening and of his transactions with the complaining witness.

Moreover, it appears that he was questioned concerning the voluntary character of his confession to the prosecuting attorney after the latter had explained to Henderson his constitutional rights. He wanted to make a complete confession and get it over with.

g

Conclusion

While the courts below, both trial and appellate, decided questions of federal import, the issues resolved by the trial judge were primarily factual. No credence was given to the story reconstructed by the petitioner after the lapse of 10 years, and the supreme court was of the same opinion. Such decisions, we respectfully submit, are in harmony with views of this Court expressed in its opinion in *Quicksall v. Michigan*, 339 U. S. 660. There are, we respectfully submit, no special and important reasons for a review in this case on certiorari and the writ should be denied.

Respectfully Submitted,

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APPENDIXES

Appendix "A"

Transcript of Proceedings had upon Arraignment, Plea, and Sentence, in Trial Court on August 5, 1942 (R. pp. 127-149).

PROCEEDINGS HAD IN THE above entitled case before the HONORABLE JAMES E. SPIER, Circuit Judge, taken at the City of Mount Clemens, in Macomb County, Michigan on August 5, 1942.

Appearances: Mr. Wilbur F. Held, Prosecuting Attorney, appearing for the People.

Respondent present in person.

10:20 P.M.
August 5, 1942
Mt. Clemens, Michigan

The Court: The record will show a deputy sheriff present, court reporter and county clerk, Circuit Court in session.

Mr. Held: If the court please, this is the case of People vs. James Henderson. The file number is 2881. The charge is rape.

The Court: James?

Mr. Held: James.

The Court: Middle name?

Respondent: Emerson.

The Court: H-e-n-d-e-r-s-o-n.

Respondent: Yes, sir.

The Court: All right, read the information.

Mr. Held: The section number is 520, Act No. 328, Public Acts of 1931. Chief Rosso is the police officer in charge of the case. (reading) "State of Michigan, Circuit Court for the County of Macomb aforesaid, for and in behalf of the People of the State of Michigan, comes into said Court, in the Present term thereof, in the year one thousand nine hundred and forty two and gives the Court here to understand that be informed that James Henderson late of the City of Mt. Clemens in the County of Macomb and State of Michigan, heretofore, to-wit: on the 30th day of July, A.D. 1942 at the City of Mount Clemens in the County of Macomb aforesaid, one James Henderson, a male person, in and upon the person of Eleanor Morris, a female person, then and there over the age of sixteen years, did make an assault, and her, the said Eleanor Morris, did then and there feloniously and unlawfully, by force and against the will of the said Eleanor Morris, abuse and carnally know, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Michigan." The information is signed by myself and sworn to and names of the witnesses are endorsed thereon and all the papers have been filed in the office of the County Clerk, he having previously waived examination before Judge Jeannette.

The following examination of the respondent then took place:

EXAMINATION BY THE COURT:

Q. You understand what you are charged with?

A. Yes, sir.

Q. How do you want to plead?

A. Guilty.

Q. You plead guilty of your own free will?

A. Yes, sir.

Q. Nobody threatened you?

A. No, sir.

Q. Nobody beat up on you?

A. No, sir.

Q. Nobody promised you anything to get you to plead guilty?

A. No, sir.

Q. You plead guilty because you actually had—forced this complaining witness?

A. That is correct, sir.

Q. What is your story? What happened?

A. She brought me in from Tassie Tavern to get my clothes.

Q. Had you known her before?

A. Well, no, first time I seen her—first day I worked out there. I was supposed to stay out of the place because I had to arise so early in the morning, clean up, so on the way back out we went down—

Mr. Held: You mean after you crossed the White Bridge —Butler Road?

Q. She was driving at the request of who?

A. One of the bartenders out there. I don't know who.

Mr. Held: John Parks or Parker.

A. I don't know who.

Q. She was doing that at the request of her boss?

A. Yes.

Q. To accommodate you and the management?

A. Yes.

Q. Right?

A. That is when the trouble came off on that road.

Q. Butler Road?

A. Yes, that is the first—then turned around and come back.

Q. What do you call trouble? What started this? Were you hopped up or something?

A. Sir?

Q. You had been taking any dope or liquor?

A. No, sir. I had a glass of beer, that was all that night, sir.

Mr. Held: Tell the court what happened.

Q. How did you get her to give into you?

A. I had a piece of steel in my bag about fourteen inches long with black cloth around, made out like it was a knife and forced her.

Q. Did you threaten her? What did you say? You remember?

A. I told her to stop the car, so she says, "Don't hurt me and I will do anything you want."

Mr. Held: Was the knife out at that time?

A. Yes, sir, I had it.

Mr. Held: You had already threatened her with it.

A. Yes, that is right.

Mr. Held: She was in fear of her life at that time?

A. Yes, sir.

Q. Then what happened? She was scared—you scared her into surrendering so that you had sexual intercourse?

A. Yes.

EXAMINATION BY MR. HELD:

Q. Where did you go, James?

A. That was on Butler Road.

Q. Down near the river bank by that fence?

A. Yes, then we turned around and come back and went to Shadyside.

Q. Now, after you got down by the fence did you tell her to disrobe, take all her clothes off?

A. No, just told her to take her pants off.

Q. Did she take any of her clothes off outside of her pants?

A. No, that was all.

Q. Then what happened?

A. Had sexual intercourse and got back in the car and I told her to turn around and go back and after we got back across the bridge I told her to go to Shadyside and went to far end of Shadyside and I had another intercourse with her and then—

The Court: You threaten her there?

A. Yes, sir. No, I didn't threaten her—just had the intercourse with her.

Q. You still had the knife?

A. Yes, it was laying on the seat beside me. It wasn't a knife, it was a—

The Court: You claim that she voluntarily had intercourse or you scared her?

A. Well, not the second time, I didn't threaten her, but I guess she was still scared from the first time from seeing it, so she had said, "Put it away, I am going to do what you said; put it away", then come back and I had second intercourse, and then I had her drive me down Jefferson to Detroit. I got out at Madison and Gratiot.

The Court: You want to ask him on the things that her story shows?

Q. Now, James, the first time you had intercourse with her you know she was in fear of her life because of acts and words spoken at that time, is that right?

A. That is correct.

Q. She had no reason to presume other than what you would use violence to get her to have intercourse?

A. That is correct.

Q. She was in fear of her life at that time and that is the reason she submitted to your act?

A. Yes.

Q. Following that you instructed her to drive to Shadyside Park?

A. Yes, drive back toward the bridge and down Shadyside.

Q. After you arrived at Shadyside you again had intercourse with her and while she was in fear of her life?

A. Yes.

Q. Before you had sexual intercourse with her at Shadyside Park did you force her to take your privates in her mouth?

A. No, sir, nothing of the sort.

Q. What?

A. No, sir, I didn't.

Q. If she says that would she be wrong?

A. Yes, she would be wrong. That is all I told you in my statement.

Q. Where did you have intercourse with her at Shadyside Park?

A. Down at the far end near the river.

Q. And was that in the car or outside the car?

A. In the car, sir.

Q. Now, did you have complete intercourse with her the first time?

A. Yes, sir.

Q. And the second time did you have complete intercourse with her?

A. Yes, sir.

Q. And following that where did you go, James?

A. Went down Jefferson to Detroit.

Q. Are you sure you went down Jefferson?

A. We went down Gratiot to, I guess to Wolf Road, first caution light and then turned down Jefferson.

Q. You say down Gratiot to the first caution light?

A. Yes.

Q. That is the two red blinkers?

A. Yes.

Q. You made a left hand turn and went over to Jefferson?

A. Yes.

Q. Did you stop any place along there on your way to Detroit?

A. No, didn't take no more stops.

Q. Are you positive about that?

A. Yes.

Q. She claims you stopped near some place and again had intercourse with her? Is that true?

A. No, I didn't.

Q. Then you drove to Detroit?

A. She did.

Q. You and she together?

A. Yes.

Q. She was still driving?

A. Yes.

Q. Where did you go to when you arrived in Detroit? Did you continue on Jefferson?

A. Continued straight down Jefferson.

Q. Did you drive around any other streets?

A. We turned up, I don't know the street we turned up, but turned until we got on Rivard and crossed Gratiot on Rivard and went up Montcalm and turned down Montcalm to John R and came down John R to Madison and that is where I got out of the car, corner of John R and Madison.

Q. At the time she got out of the car was there any word spoken about being out of gasoline?

A. No, that was spoken on the way down to Detroit.

Q. When you left her did you give her any money?

A. I give her on the way to Detroit.

Q. How much did you give her?

A. I don't know; I think fifty cents in change.

Q. Where did that money originally come from?

A. I got it from her.

Q. Where was that taken from?

A. At Shadyside, sir.

Q. And out of her purse?

A. Yes.

Q. Where was her purse?

A. On the seat beside us.

Q. And that was also taken from her while she was in fear of her life?

A. Yes, sir.

Q. Would I be wrong if I said it was around $2.90?

A. I am not sure how much it was exactly. It was around, yes, sir.

Q. But $2.90 wouldn't be far wrong, is that right?

A. I don't think so, sir.

Q. And after she told you she was low on gas you gave her fifty cents to get some gas with?

A. That is correct, yes, sir.

Q. You had never seen her previous to this day. Is that right?

A. That is right.

Q. And you didn't know who she was or heard of her previous to this day?

A. That is correct.

Q. When did you first get into your mind to have intercourse?

A. After we turned off the bridge going down Butler.

Q. That was all because of what your desires were, is that right?

A. I guess.

Q. That is what you wanted to do and that is what you had in your mind?

A. Just come in my mind at the time.

Q. Did she do anything to cause anything like that?

A. No, sir.

Q. Have you ever been arrested and convicted before?

A. Yes, in 1936 in Detroit, Judge Stein's Court.

Q. What was that for?

A. Robbery unarmed.

Q. And what was your sentence?

A. One to ten.

Q. Where? Jackson?

A. Sentenced to the House of Correction but served my time in Ionia Reformatory.

Q. How long did you serve?

A. I served from April 10, 1936 until December 24, 1937.

Q. Have you ever been arrested and convicted of any other charge?

A. No, sir.

Q. Have you ever assaulted any other women, colored or white?

A. No, sir.

Q. Have you ever had any difficulty of a sexual nature with any other person?

A. Well, one time I went to a disorderly house, so next day I didn't know the girl was under age and her mother tried to have me arrested. I was over at Berea. I went over to Cleveland. I was in Cleveland when the trouble come up. I went to Cleveland where they wanted me at the police headquarters and she told them to turn me loose; was no charge against me because this girl was in a disorderly house.

Q. You are originally from Berea, Ohio?

A. No, I have been in Mt. Clemens since 1925.

Q. You mentioned Berea?

A. I lived there, yes.

Q. Have you been arrested and convicted of any other minor charges?

A. None.

Q. Have you ever had any venereal diseases?

A. Once in Mt. Clemens, I think.

Q. What was that?

A. I don't know. Doctor Reitzel was my doctor— gave me shots.

Q. How long ago was that?

A. That was about four years ago.

Q. Was that what was known as gonorrhea or syphilis?

A. Syphilis, minor disease.

Q. How long ago was that?

A. About four years ago.

Q. Are you completely cured of that now or not?

A. I am. I was at that time. I have had a physical examination and blood not long ago and I proved O.K.

Q. Do you know if you are suffering from syphilis now or not?

A. I don't think so. I wasn't suffering from it then. I had my blood test. They took my blood test and I was supposed to report for induction at the hospital and I didn't hear nothing from it then so I know I ain't— nothing wrong with me.

Q. Can you explain why this was done? Was it because it was a white woman in the car with you and you were seized with a sudden impulse, or what?

A. I don't know.

Q. Have you ever had those impulses before in such a manner?

A. No, never did nothing before to nobody.

Q. When did I first see you?

A. Tonight in the city jail.

Q. Where were you then?

A. In the cell over there.

Q. What were the first words spoken at that time, James?

A. You asked me did I want to tell you all about it and I told you yes.

Q. And you were in your cell and I was on the outside?

A. That is correct.

Q. Following that where did you go?

A. Into the Chief's Office.

Q. What took place there?

A. You asked me if I wanted to tell you and I did, and you asked me if I wanted to make a confession.

Q. And I explained what your constitutional rights are?

A. Yes.

Q. Explained in detail what your constitutional rights were and you didn't have to make a statement?

A. Yes.

Q. That was all done before a statement was made?

A. Yes.

Q. So that anything said over there or any statements signed by you were all free and voluntary and made with your knowledge they could be used against you?

A. Yes.

Q. And so you wanted to make a complete confession and get the matter over?

A. Yes.

Q. I also told you no threats or promises or inducements of any kind or nature could be made to you or offered to you to get you to make that statement?

A. That is right.

Q. And you were fully aware of that at the time that was said?

A. Yes.

Q. I also told you no one could threaten you or in any way intimidate you or use any force on you to get you to make a statement?

A. That is right.

Q. Was any such tactics made to you?

A. No.

Q. Any hand laid on you at all?

A. No.

Q. By any police officer or law enforcement agent of any kind?

A. No.

Q. No one has ever touched you?

A. No.

The Court: How was he arrested?

Q. Following this where did you go?

A. Went to the theater and stayed until daylight and took a Michigan street car to the end of the line and hitchhiked to Ypsilanti to see a friend.

Q. Girl friend?

A. Yes.

Q. What is her name?

A. Joyce Smith.

Q. Where does she live in Ypsilanti?

A. On Barnard Street. I don't know the number.

Q. Did you see her?

A. Yes.

Q. How long did you stay there?

A. I stayed there that noon, in the house with her and the family that noon, and she asked me to stay until next day. I told her—I usually stayed with another friend—she usually let me stay there, so I went and stayed at the police department so I went back to see her next morning, stayed with her until about two-thirty that afternoon and then I left and went to Chicago.

Q. What did you do in Chicago?

A. First day I got there went to work in a restaurant, worked two days in a restaurant.

Q. What is the name of the restaurant there?

A. Marie something.

Q. What street is it on?

A. I think South.

Q. Wabash, Jackson?

A. No, South Parkway, in the 4200 block.

Q. And how long did you work there?

A. I worked there three days until fellow come back to work.

Q. What type of work you do there?

A. Dishwashing and little short order work.

Q. And you stayed there three days?

A. Saturday and Sunday and part of Monday. He come back to work Monday afternoon.

Q. Where did you go then?

A. I went to South Bend to see my cousin.

Q. And his name or her name?

A. Felix Curtis.

Q. Where does he live?

A. 1133 Burns Avenue.

Q. And how long did you stay there?

A. Until this morning, seven-thirty.

Q. And you left South Bend at seven-thirty this morning and where did you go then?

A. I went to Ypsilanti and stopped at Miss Nance, Mrs. Nance's.

Q. Is that the place you previously were?

A. That is where I usually stayed when I went there.

I usually go by there because it is near town, so she told me the law had been looking for me. She showed me some clippings her girl had seen out of the newspaper. She asked what I was going to do and I said I was going to Mt. Clemens to see what it was all about. She said, "Are you guilty"? I said no. She said "You had better go back to see what it is all about." I started downtown and went to the State Police to give myself up.

Q. You did that this afternoon at the Michigan State Police post.

A. Yes.

Q. What time was that?

A. Five o'clock.

Q. During any of this time did you tell anybody about your escapade here?

A. No, No one here at all.

Q. You didn't tell your girl friend at the time you went over there?

A. No.

EXAMINATION BY THE COURT:

Q. How old are you?

A. Twenty-five.

Q. Ever been married?

A. Yes.

Q. More than once?

A. Once.

Q. Where?

A. I was married here in Mt. Clemens, May 10, 1941.

Q. Where is your wife?

A. She is in Cleveland, Ohio, now sir.

Q. How long did you live together?

A. Stayed together nine months.

Q. Who married you?

A. Reverend Woods down on Robertson Street. I am not sure of his address.

Q. Have you any children?

A. No, sir. She has one girl, I have none.

Q. What?

Q. What?

A. I have no children.

Q. She has one girl?

A. Yes.

Q. Has she been married before?

A. I don't know that. I don't think so.

Q. How old is the girl?

A. Two years.

Q. She hasn't had any child by you?

A. No, no child.

Q. Where were you born?

A. Dayton, Ohio.

Q. Your birthday?

A. July 17, 1917.

Q. And what is your last residence?

A. My mailing address, 19 Barbara Street.

Q. Whose place is that?

A. My cousin.

Q You have been staying with him since you were in Mt. Clemens?

A. Well, I have been staying with him off and on, rooming with my brother.

Q. Where did you work around here?

A. Worked for the Cozy Kitchen; they went out of business; went to Selfridge Field, and from there went to the Glenwood.

Q. How long you work at the Glenwood?

A. Last time worked there about four weeks. I stayed in Ypsilanti about four days, tried to get in the bomber plant out there. Then I come back and went to Tassie Tavern, first day went to Tassie Tavern.

Q. Ever work any place longer than four weeks?

A. Yes, I used to work for Sol Adeskin, worked for him over a year. Used to make these hotels every summer and most time I would go back to Ohio during winter or go back to Kentucky.

Q. This is the only time you have been married?

A. Yes, sir.

Q. You claim you never assaulted anyone?

A. That is correct, sir.

Q. Girl or Woman?

A. That is correct, sir.

Q. Since 1935 you have been in Mt. Clemens? How long you been in Michigan?

A. I come to Michigan June 13, 1935.

Q. Did you go to school?

A. Yes, sir, at the Ohio Soldiers and Sailors Orphans Home at Zania, Ohio.

Q. How far through school you go?

A. 11-A.

Q. Is that an orphan school?

A. Yes, sir.

Q. Your father and mother —

A. Dead.

Q. You know anything about them?

A. My mother died August 12, 1939. I don't know when my father died. He died when I was a baby.

Q. Have you any brothers and sisters?

A. I have two brothers here in Mt. Clemens.

Q. They ever been arrested?

A. No, sir.

Mr. Held: What are their names?

A. Louis Henderson and Raymond Bates.

Mr. Held: Are you any relation to Vaughn Henderson?

A. No, sir.

Q. This 1936 offense the only time you ever been arrested for anything?

A. Yes, sir. I was called in here once, something about peeping down on Cass Avenue, but the shoe print was size six shoe and couldn't have been me. I was staying down there at that time. I was working for a lady, I don't know her name, down at the corner of Cass—McKenzie, I think.

Q. You know the seriousness of what you have done?

A. Somewhat, sir.

Q. What kind of sentence you think you ought to get?

A. I am ready for anything that is supposed to come to me.

Q. What?

A. I am willing for anything supposed to come to me, sir.

Q. You know it carried a life sentence, do you?

A. I didn't know that, no, sir, I didn't know that, sir.

Q. Do you have any idea what kind of sentence it carried?

A. Somewhat, sir. I have heard of cases, sir.

Q. What?

A. I have heard of several cases, sir.

Q. The fact it might carry a life sentence, that make any difference in your plea of guilty?

A. I wouldn't change my plea because I know I am guilty; no use trying to run around--trying to fight it.

Mr. Held: In Berea, Ohio, is it true you cannot go back there now because of some assault on some girl down there?

A. I can go back to Berea, Ohio, at any time. I have no reason to be afraid to go back.

Q. Or Lindale?

A. No, go back to the police there and ask them my record. They will tell you. I forgot the police woman's name. She can tell you. She was the one told me to leave after my wife and I had trouble. She told me it was best to come back to Michigan. I come over here to make a home for my wife and family. My wife was living with a fellow. We had trouble with the family. She went to live with this fellow. She said I wasn't getting anywhere very fast. I went back to see what was going there, so we had quite a bit of trouble. She told my wife to leave town but she never told me to leave town. She did say she would leave and leave all that trouble down there.

Q. Ever been in any cutting escapades?

A. No, sir.

Q. Ever have a fight, assault anybody?

A. Sir?

Q. Ever have a fight?

A. Ever have a fight?

Q. Ever get in a fight with anybody?

A. No, sir, not here.

Q. Ever have a gun and do any shooting at anybody?

A. No, sir, never carried a gun in my life.

Q. Ever carry a razor?

A. No, sir.

Q. You always carry this knife along?

A. I never had a knife.

EXAMINATION BY MR. HELD:

Q. It wasn't a knife. It was a piece of metal resembling a knife.

A. I never carried no kind of weapon with me at all.

Q. This time you were arrested in Detroit, was that a robbery unarmed charge in which a woman was the complaining witness, or male person?

A. Woman.

Q. Was there anything of a sexual nature concerning that?

A. No.

Q. What did you do in that case? What were the facts in it?

A. You mean during the case or during the charge?

Q. What did you do which caused your arrest?

A. Well, I was on my way out to Ford's one morning, walking out West Fort Street, and about four o'clock the police picked me up and said, told me stick them up, and I asked what was the matter and they said, "You are the one, all right", and I said, "One what"? They said I had held up a woman and took some money. I didn't have no money on me at that time because when I left my uncle's house I didn't have a red cent on me, so carried me back to the Forest Street Station. This is the first time I was ever in jail in my life. I didn't know just what to do at the time. They carried me back and took me out and talked to me carried me back again and carried me out and talked to me and talked to me again and they carried me in a little room and I got afraid and pleaded guilty and they carried me to Central Station about nine that morning and I changed my plea from guilty to not guilty and they sent me State's lawyer and he listened to the case and told me to plead guilty and I would get off easy and I did plead guilty and sentenced me from one to ten.

The Court: You know anything about him—police department?

Officer Eugene Smith: Nothing other than it was a woman involved in the action against him.

The Court: What do you want to do?

Mr. Held: If the court please, I move for sentence at this time. I might say before sentence is passed that this is about the worst case I have ever seen since I have been in the prosecutor's office. There isn't any reason for it. There is nothing at all that this woman done which would cause Mr. Henderson here to do anything like that. She was strictly doing what she was told to do and while she was in the car with this man, not because she wanted to but because she is under the employ of someone else, who

told here to drive him to Mt. Clemens, she finds herself in this position where she is confronted with either her life or having sexual intercourse. Like anybody else, she would rather live, and that was done not only once but twice, and, on top of that, we have the situation where a robbery armed offense, as well as rape, took place. They both carry a life sentence and I would move for the maximum sentence or a number of years so that Mr. Henderson will not be allowed to mingle with society again. I don't believe he is the type of person that should ever be allowed to mingle with society again because we have to protect womanhood in this country.

The Court: There is something about this whole picture that makes a person think that there is something wrong mentally in your case. If her story is true, it is even worse than your story here today. There is no reason for doubting her story. Have you anything further to say at this time?

Respondent: No.

The Court: It is the sentence of this Court that you be confined to the State Prison of Southern Michigan at Jackson for the rest of your natural life. I guess that is all.

Appendix "B"

Second Motion for New Trial or, in the Alternative, Motion for leave to file Delayed Motion for New Trial. Supporting Affidavit (R. 104-106, 107-110).

(Filed, June 24, 1952)

Now comes the defendant, by GOODMAN, CROCKETT, EDEN & ROBB, his attorneys, and moves the Court for a

new trial or, in the alternative, for leave to file a delayed motion for new trial, for the following reasons.

1. That on August 5, 1942, defendant was arrested, arraigned, and convicted of the crime of rape, and on the same day was sentenced to life imprisonment.

2. That the judgment of conviction and the sentence based thereon are illegal, invalid, and void, for the following reasons:

a) The defendant voluntarily surrendered himself to the Michigan State Police when he first heard that a warrant was issued against him, at approximately 5:00 o'clock P.M. on August 5, 1942. He was taken into the custody of the Macomb County law enforcement agencies at approximately 7:00 o'clock P.M. on the same date, and was thereafter interrogated, arraigned, convicted and sentenced, all in the period of approximately three hours, without the advise of counsel or the opportunity to obtain an attorney, without the counsel of friends or the opportunity to communicate with friends, without a public trial, without the interrogation of the complaining witness or the introduction of any other testimony against him, and solely on the basis of a confession of guilt made by the defendant following threat of mob violence by persons gathered outside the court building at the time.

b) The trial, conviction, and sentence of the defendant under the circumstances set forth in the affidavit hereto attached, constituted a denial of due process, contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

c) The trial, conviction and sentence of the defendant without a public trial constituted a violation of the defend-

ant's rights under Article II, Section 19 of the Michigan Constitution.

d) The defendant "confessed" to the crime of rape only because of the circumstances surrounding his detention and interrogation, and because of the threats made against him, and not because he was in fact guilty of the crime, as set forth in the affidavit hereto attached.

e) The defendant would not have plead guilty to a crime which he did not commit if he had had the opportunity of consulting with counsel or with friends or relatives, and if the entire proceedings had not been hastily rushed through at a closed "trial" at night during a period of approximately three hours.

f) The defendant was entitled to have his guilt or innocence passed upon by an impartial jury at a public trial, with sufficient time for preparation, after being afforded the right to counsel, without intimidation by a hostile mob outside the courtroom, and after presentation of evidence against him and particularly the testimony of the complaining witness.

4. That a motion for new trial was filed by defendant on October 23, 1947, which motion was denied in an opinion filed by this court on February 25, 1948. That said motion, prepared by the defendant *in pro per*, was based entirely upon the denial of his right to counsel and did not raise the other issues herein set forth because of the belief of the defendant that the denial of counsel was a sufficient basis for the granting of a new trial. That on May 15, 1948, a motion for a rehearing of the motion for new trial was filed with this Court, but no subsequent action was taken upon said motion.

5. That there has been a substantial miscarriage of

justice and a denial to defendant of his rights under the Michigan and Federal Constitution, which can be rectified only by the granting of a new trial.

This motion is based upon the files and records in this cause and the affidavit of James Henderson, hereto attached and made a part hereof.

WHEREFORE, defendant requests this Court to grant a new trial in this cause, or, in the alternative, that this Court grant leave to defendant to file a delayed motion for new trial.

GOODMAN, CROCKETT, EDEN & ROBB
Attorneys for Respondent
3220 Cadillac Tower
Detroit 26, Michigan
WO 3-6268

BY: /s/ Ernest Goodman

DATED: DETROIT, MICHIGAN
JUNE —— 1952.

AFFIDAVIT OF JAMES HENDERSON

STATE OF MICHIGAN)
COUNTY OF JACKSON) SS

JAMES HENDERSON, being duly sworn, deposes and says:

1. That he is the defendant in the above entitled cause and is now a prisoner in the Michigan State Prison at Jackson, Michigan and has been since August 6, 1942.

2. That on August 5, 1942, he was convicted of the crime of rape by Circuit Judge James E. Spier in the Circuit Court for the County of Macomb at Mt. Clemens, Michigan, and sentenced to life imprisonment under the circumstances hereinafter set forth.

3. That he did not commit the crime of rape as charged in the warrant upon which he was convicted nor did he commit any other crime in his relations with the complainant, Eleanor Morris.

4. That on August 5, 1942, not having previously known of the issuance of a warrant against him, on his return from Chicago to Detroit, he stopped at the home of a friend in Ypsilanti, Michigan, who showed him a newspaper article stating that a warrant for rape had been issued against him. That he immediately went to the office of the Michigan State Police in Ypsilanti, Michigan, at about 5:00 P.M., and advised the person in charge of the office that he was the person who was apparently wanted by the Mt. Clemens Police. He was thereupon driven by the Michigan State Police to Grand River and Seven Mile Road in Detroit, Michigan and then transferred to an automobile belonging to the Mt. Clemens Police Department and taken to the Macomb County Jail where he arrived at approximately 7:00 P.M. to the best of his knowledge and belief.

5. That he was interrogated in the County Jail by a number of detectives and police, including the Mt. Clemens Chief of Police and by the Justice of the Peace, who sought to obtain a confession from him. That this deponent denied that he was guilty of the crime of rape and told them of the incidents which had occurred during the night of July 29 and the early morning of July 30, 1942, negating any such crime or intent to commit any such crime.

6. That while he was in the cell at the Macomb County Jail, several policemen told him that a mob had gathered on the outside of the jail and that unless he confessed to the crime, they would turn him loose to the mob.

7. That thereafter, and at approximately 9:00 P.M., to the best of his knowledge and belief, he was taken out of the cell and led through a tunnel from the jail to the Macomb County Court House and there taken by elevator to the 9th floor where he was brought into the court room of Judge Spier. That while in the court room, he was further interrogated by police, detectives and officials in an effort to obtain from him a confession of the crime. That he continued to deny that he had committed any crime and requested that his brother or some other member of his family be called so that he could talk to them. This and similar requests were denied.

8. That during the period of this questioning, a police officer told him to look out of the window to the street below, that a mob had gathered and that he would be turned loose to the mob if he did not confess. That he did look through the window and saw a large number of people below, some of them looking up in his direction.

9. That as the interrogation continued, he again asked to see a relative or a lawyer. He was advised by the persons who were interrogating him to confess to the crime. He was told by one of the persons who interrogated him that he would "get a break" if he confessed. He asked on several occasions why the police didn't bring the complaining witness to court. He was told that she was not available. Finally, deponent, under the continuous questioning and because of the lack of a friend, advisor or lawyer, by reason of the threat of the mob on the street below and despite the fact that he then knew, as he does now, that he

was innocent of the charges against him, agreed to confess to the crime of rape which he did not commit.

10. That later, shortly after 10:00 P.M., to the best of his knowledge and belief, Judge Spier convened court. Numerous statements were made by the Prosecuting Attorney and the Judge, and he was questioned at considerable length, during which questioning he admitted that he had committed the crime of rape, even though he had not done so. Neither the complainant nor any other witness appeared at the hearing nor was any evidence introduced other than his own testimony.

11. That during the entire period of time that he was in the courtroom, it was not open to the public and no members of the public, to the best of his knowledge and belief, were even permitted to come into the court room, nor did any such persons appear in the court room. The only persons in the court room were the court officials, attaches, police, detectives and perhaps newspaper reporters.

12. That, so far as deponent knows, he was not arraigned before the Justice of the Peace nor was he asked to waive an examination, nor did he do so.

13. That at approximately 11:00 P.M., immediately after he had been sentenced to life imprisonment, he was taken by the police to the prison in Pontiac, Michigan, and the following day was taken to the State Prison at Jackson, Michigan.

14. That your deponent has obtained copies of the newspaper articles which appeared in the only daily newspaper published in Mt. Clemens, Michigan, the *Daily Monitor Leader*, which articles were published in the newspaper on July 30, July 31, and August 6, 1942. Copies of these articles are attached hereto and marked Exhibits A, B, and

C, and made a part hereof. The information contained in said articles with respect to the threats and the mob is true to the best of deponent's knowledge and belief.

15. That your deponent did not include several of the statements herein set forth in his previous motion for new trial filed by him in this case, for the reason that he was not aware of their importance as a basis for obtaining a new trial. At the time he filed said motion for a new trial, he assumed that he was entitled to a new trial solely by reason of the fact that he had not had an attorney, and did not understand the importance of other facts as constituting a denial of his constitutional rights.

[Duly verified]

Appendix "C"

Statements made by Circuit Judge during first hearing on Defendant's Second Motion for new Trial (R. 13-15)

(Hearing, Aug. 15, 1952)

I should make some statement here in respect to the practice that used to exist some ten to twenty years ago and previous, the practice that still continues. I think counsel will find, in many rural areas, holding court at any hour of the day or night at convenience of the public officials, witnesses, parties interested, and that was the practice in this circuit until I doubt if it happened within the past eight or ten years. This is ten years ago this happened. I think we are fairly safe in saying that is about the time the practice ceased. It is not to be commended in criminal cases. I think those of us engaged in judicial work have frowned upon it and through our practice and conclusions because of the fact in some instances it did result in injustice, resulted in the

adoption of court rules which now practically stop this objection of socalled speedy justice. The court rules now outline the proceeding to be followed and they also prescribed that before sentence the defendant should be referred to the probation department. In other words, we are constantly putting safeguards around anyone accused of an offense to insure fair and impartial consideration under any and every circumstance.

I think I can safely say that perhaps the most difficult work of any judicial officer, the thing that causes him to lie awake nights, is the worry and fear that in some moment of haste or inadvertence there may be an injustice committed, particularly in a criminal case where the liberty of an individual is involved. For that reason I think that every court should exhaust every means at hand to ascertain that the party brought before him knows what he is doing and understands the nature of the charge against him, and that he enters any plea of guilty freely and voluntarily, without any intimidation or force. That certainly has been the practice of the courts in this circuit. As I say, some ten years ago or better this practice of entertaining pleas of guilty during the evening hours was not infrequent, although no longer practiced. Now, the purpose back of that was purely one of disposing of the case promptly; secondly, for the reason that it is a known fact that a party arrested and accused, associating over in jail any length of time with more experienced criminals, very often was talked into fighting the case regardless whether he was guilty or innocent, and very often advised that it cost him nothing to put up a fight, why plead guilty, the state will appoint an attorney. It resulted in many times trials that resulted in the same net result, except it was at considerable more expense to the taxpayers and no injustice to our knowledge was incurred other than —well, I can't say no, because there have been cases before me that I have set aside pleas of guilty because I was satis-

fied that the respondent did not know his full rights, he had not had experience before, or for some reason I was not satisfied that the plea was free and voluntary. It happens every year. I recall certainly not less than two years ago one Negro boy case that was remedied. I think any court will be quick to set aside a plea of guilty and sentence where the court feels there is any question about the voluntariness of such a plea, but back in those years at the request of the prosecutor or state police it was occasionally resorted to—we have someone who has confessed, has waived examination, and they want to dispose of it before he changes his mind. That is, frankly, the situation that used to exist. There were occasions then when the court was opened, the building was opened, the elevators were running, the public had access to the courtroom, the parties would be openly brought across and arraigned, if they were not out on bond, and arraignment and plea entered and record made here.

That apparently was done in this case, the unusual feature being that he had only been arrested that same afternoon apparently. Now, counsel is correct in saying that is a circumstance to be carefully considered in determining whether or not the plea was a free and voluntary one. Counsel is correct on the other points he has raised. We have no quarrel whatever with any of the law counsel cited. He is correct, and I will say counsel very ably presented the picture in taking advantage of every point that apparently could be raised in this case.

Counsel is absolutely correct in saying that had there been the least intimation there was a mob or threats made that the court should not have accepted such a plea. There apparently is nothing in the record or anything about any mob or crowd or group or threats made against the defendant, only his own affidavit now made ten years later, but somewhere along the line apparently subsequent to the

other motion for new trial there must have been some intimation made to the court because there was some inquiry made and at that time the court was informed that there was no truth of the mob story insofar as any mob was concerned, that there were six or seven people, curiosity seekers, around the jail, such as would normally be found where there had been an arrest and police car comes in with someone under arrest. There was no undue commotion, nor unusual crowd. That is not to say this defendant might not be informed there was, but from the factual standpoint the court was informed at that time. I do not understand why there is not some affidavit in that respect in the record, but we will have to take the record as it is. We have only the mob article. We are bound to take the point that newspaper writers are bound to seize upon the spectacular and prone to exaggerate for the purpose of making a story sometimes. That standing all by itself, the newspaper article, would certainly not justify granting a new trial.

Another circumstance which we should consider carefully is the fact that this respondent filed—and obviously with the help of somebody because he certainly had help and advice in order to prepare—the pages are not even numbered, but there are obviously some thirty pages of typewriting in very legal language—counsel has probably perused it—he had some assistance in filing a motion which was heard here in 1948, February, and at that time, even though apparently counsel who argued the motion did not prepare the motion, he had full opportunity, of course, and presumably did, interview the respondent, covered the motion, and, with a reputation as capable attorneys, firm well known, must presumably have taken advantage of every angle, every then existing reason for seeking a new trial.

Now, there is no point in any of those papers filed or in the argument was the claim made by the defendant—

that was back in 1948 or 1947 when it was filed—and that would be about five years after the offense—at no time did he make any claim then that the plea was not voluntary or that it was made by reason of any force or intimidation. The main issue was he was not accorded counsel which was guaranteed him under the Constitution. It is significant that he did not at any time up to that point deny he was guilty. He merely stated he was not accorded his rights in having counsel. That point was clearly argued. Every other point raised, none of them included this question of intimidation of this mob question.

The court gave it very careful consideration, great many hours spent in studying that case and lengthy opinion filed. Still there was no claim of any force or intimidation.

Appendix "D"

First Opinion of Trial Judge denying Defendant's Second Motion for New Trial (R. 117-24).

(Filed, Jan. 20, 1953)

This matter is before the court upon a motion to set aside the plea of guilty entered by defendant August 5, 1942.

The matter was taken under advisement December 8, 1952, the final date for filing of briefs and affidavits.

In the evening of **August 5, 1942,** defendant James Henderson was arraigned before this court by the prosecuting attorney for Macomb County. The building and courtroom were open to the public as public meetings were being held in the building, it being the night of the city commission meeting.

After reading the information the defendant pleaded guilty. The court then proceeded to question the defendant at length before being satisfied that the defendant knew what he was doing and was making his plea voluntarily and free from any coercion.

A copy of this twenty-two (22) page examination is attached to this opinion.

The prosecutor represented to the court that this was a very aggravated case and stated that this case was "the worse case" he had ever seen. The statement of the victim gave some justification for the prosecutor's stand in the matter and the court imposed a life sentence.

On **October 23, 1947,** the defendant filed an "Application for leave to file delayed motion for new trial and set aside the sentence imposed upon the defendant," together with a "Motion for new trial and writ of habeas Corpus Ad Testificandum," together with a "Brief in support of motion for leave to file a motion for a new trial and set aside the sentence imposed upon the defendant."

These papers were filed by the defendant in proper person, signed by him in person, and contain at least one affidavit sworn to by him before a notary. The papers as filed by the defendant consist of some fifty (50) typewritten pages and contain extended quotations from the Constitution and various Federal Court decisions and Michigan Supreme Court cases, as well as Michigan Statutes.

On **January 19, 1948,** the law firm of Lewis, Howlette, Brown and Wanzo filed an appearance on behalf of the defendant.

On **February 9, 1948,** attorney Alvin Wanzo of that firm appeared in court and the motion for new trial was argued and submitted to the court.

On **February 24, 1948,** this court filed a fifteen (15) page opinion carefully analyzing the principal ground on which the motion for new trial had been submitted and argued, namely, the absence of counsel for the defendant at the time of the arraignment. A copy of that opinion is attached hereto and must be read in connection with the present motion.

On **March 31, 1948,** the order was entered denying the motion for new trial.

On **May 15, 1948,** counsel for defendant filed a "Motion for rehearing of motion for new trial," together with an "Amended Motion for new trial." In neither one of these is there any claim of intimidation nor claim of innocence.

While there were subsequent discussions between counsel, the prosecutor and the court, there apparently was no record made of any disposition of this motion for rehearing since no order appears to have been entered disposing of the same.

The next matter appearing in the file appears to be filed **June 24, 1952,** and is the present motion for new trial.

Before discussing the motion filed in June, 1952, the court should call attention to certain facts which forcefully impress themselves upon the court.

Prior to June, 1952, and for this entire ten year period from date of sentence, (lacking forty-two (42) days) the defendant did not at any time, nor in any papers filed with this court, claim to this court that he was innocent, or claim that he was not guilty, nor did he at any time in that period claim to the court that his plea of guilty had been entered by reason of any fear or intimidation.

This court has read and reread every paper filed during that ten year period by the defendant or by his counsel and nowhere do any of them make any claim that the defendant entered his plea by reason of any fear or intimidation or threats of violence or mob violence, nor was any reference made to any such thing as a mob, nor does a careful perusal of all of these papers filed by the defendant in that ten year period discuss any claim or even an intimation that the defendant was not guilty of the offense to which he pleaded guilty.

In fact, the opposite can almost be inferred from the papers filed.

The entire claim and the theory of the defendant and his counsel during this ten year period was only that he had been denied his constitutional rights in that he was not represented by counsel at his arraignment.

In defendant's application in 1947 for leave to file delayed motion for new trial, the only affidavit occurring in the papers contains the following recitation:

> "That this application is made in good faith and without malice, that he has and will use the proper and all available means to secure legal justice, and if he should encounter any further infringement of his constitutional rights or privileges, he shall again seek legal justice in the manner that is provided by law by the public court he shall seek it if immediate relief shall require. That he has made a careful examination in said cause and verily believes he was not accorded a fair trial in said cause. That the long delay was not culpable neglect on his part. * * *"

At the 1948 arguments for new trial there was no claim

made that the defendant was not guilty, or that the plea was entered through intimidation or fear.

In this court's opinion of February 24, 1948, the various Supreme Court opinions were discussed pertaining to the question of the absence of counsel for defendant being a denial of due process of law. The legal conclusions reached by this court in that 1948 opinion have since been confirmed by subsequen. Supreme Court opinions.

In re Elliott, 315 Mich. 662

People vs. Quicksall, 322 Mich. 351, 339 U.S. 660 94 L. ed. 1188

People vs. Gunsell, 331 Mich. 105

However, the facts of each case have to be carefully studied. In some of the final paragraphs of this court's 1948 opinion the court stated as follows:

> "Were the question before it, this court would also hold that due process of law had been denied if a youth unfamiliar with legal proceedings had been charged with murder or a complicated charge, and was not given the aid of counsel, and the record showed confusion in the defendant's mind as to his plea, or the consequence of his plea were not explained. Certainly the 'totality of facts' add up to a denial of his rights under such circumstances.
>
> But that is not the case before us here. We have here a twenty-five year old man, married, although separated from his wife. He was familiar with criminal proceedings. He had been arrested in Cleveland because of intercourse with an underage girl, but released after investigation because the girl was in a disorderly house. He had been arrested in Recorder's Court, Detroit,

pleaded guilty to robbery unarmed, changed his plea to not guilty, then upon the state furnishing him a lawyer, who consulted with him in jail, he pleaded guilty upon his lawyer's advice, and served one year and eight months at the Ionia State Reformatory, on a one to ten year sentence.

The charge here is not a complicated one. No one knows better than the defendant whether the act of intercourse was a natural, mutual act, or whether it was by force and against the will of the girl. After being warned of his rights, he freely admitted to the "officers, and the prosecutor, that the girl submitted to him through fear, as a result of his threats. He repeated his statement in open court to the judge, and, after being told the plea of guilty might carry a life sentence, he did not want to change his plea, saying he knew he was guilty.

This court would be the first to set aside any conviction where any facts were shown indicating a miscarriage of justice or denial of constitutional right.

Neither the United States Supreme Court, nor the Constitution, requires that counsel be appointed in every case where not requested. No request was made in this case. Ample opportunity was given defendant to make any request. There was no denial of his right to counsel had he wanted one. This court knows, and the record shows, that defendant knew what he was doing when he pleaded guilty, that he knew the possible consequences of his plea, and it appears that his present motion is a subsequently acquired desire to take advantage of a Federal Court decision which has been given a broader interpretation by the press and public, and particularly the prison population, than the opinion itself intended or specifies.

> The 'totality of facts' in this case do not add up to a denial of due process of law, and the motion should be denied."

The present motion was filed June 24, 1952, by Goodman, Crockett, Eden & Robb in behalf of the defendant, and contains the affidavit of the defendant, alleging for the first time that he did not commit any offense, and alleging for the first time that he pleaded guilty because of fear of a mob in the street.

This affidavit is of considerable importance and has been skillfully prepared, but has been built around certain facts which this court knows are false and must take cognizance of.

The defendant swears he was taken out of the cell and led through a tunnel from the jail to the Macomb County courthouse. This is false. There is no tunnel of any kind. The jail is diagonally across a main downtown intersection from the county building. The only way prisoners can be brought over to court are out through the front entrance of the jail on the main street and across the main public walks and street intersection. Whoever prepared this part of the affidavit obviously must have had in mind the Detroit Recorder's Court arrangement, where a tunnel is used to walk prisoners from the jail or police headquarters to the Recorder's Court rooms.

Furthermore, the affidavit states the affiant looked out of the court windows to the street below and saw a "large number of people below, some of them looking up in his direction." Because of abutments it is physically impossible to see the street or sidewalks from the court room windows where defendant was arraigned, with the exception of one window from which can be seen the intersection of streets and sidewalks located one block west of the intersection on

which the jail is situated. Neither the jail, nor street intersection located there, nor the widewalk between the jail and the main entrance of the county building, can be seen from this one and only unobstructed window.

Had there been any unusual number of people interested, there was nothing to stop them from coming into the building or the courtroom. All doors were unlocked and an elevator was running for public use, as other public gatherings were going on in the building. Defendant's affidavit itself indicates that only the usual group customarily found present at arraignments, even at morning or afternoon sessions namely, newspaper men and court attendants, were in attendance.

Moreover, the court would have been aware of the fact had there been any unusual number of persons either around the jail or the courthouse, and would have a lasting memory of such a situation. In this court's experience of twenty-three years there has never been a mob nor even an intimation (prior to this affidavit) of a mob in connection with any case before this court.

This allegation of the existence of a mob is a fabrication, built upon a newspaper article that merely quoted the officers as saying that their fear of violence was the reason for asking immediate hearings. The news article in no way intimates the existence or imminence of any mob or even curious group. The affidavits of the officers also show no mob existed.

Defendant's counsel use the words "without a public trial" and "closed trial at night" and state that no testimony of the complaining witness was taken.

Counsel well know that a plea of guilty is a waiver of trial, and that such proceedings are not referred to as a

"trial." Further, counsel well know it is not customary to take testimony of anyone upon a plea of guilty (except in murder cases where required by statute).

These misleading phrases and allegations have been seized upon for propaganda purposes, as may be commented upon later.

As to the defendant's claim that he was denied opportunity to advise with friends, certainly he had every opportunity while before the court to make known any such desire, in the course of the twenty-two pages of free discussion. It must be kept in mind that the defendant was familiar with court procedure to some extent. He had been through the identical experiences in 1936 when he pleaded guilty in court, then next day changed his plea to not guilty and had a lawyer appointed, and then later pleaded guilty again.

Unless arraignments are to be done away with entirely and pleas of not guilty automatically entered, it is hard to conceive a more frank admission than that disclosed by the record, in which, toward the end, the defendant insists,

> "I WOULDN'T CHANGE MY PLEA BECAUSE I KNOW I AM GUILTY: NO USE TRYING TO RUN AROUND TRYING TO FIGHT IT."

The fact that his present claims of an actual mob are false impels the court to give similar interpretation to his other allegations of intimidation, especially where they were not raised before the court until ten years later.

False statements by officers to an accused, of threatened or probable mob violence, could readily be held to be sufficient grounds for a new trial, if the accused were intimidated thereby, even though no actual mob ever existed. However, as pointed out, the accused here has destroyed the

reliability of his claims of threats or intimidation by falsely swearing to the actual existence of a mob.

Such latter claim may make better propaganda, but obviously the accused best interests were not served by such false statements.

If there were any doubt about the truth or the voluntariness of the defendant's plea in this or any other case, this court would be the first to want it set aside. This court has done so in other cases. However, there is no doubt in this court's mind on either of these points in this case.

The plea of guilty was voluntarily made. The defendant thereby waived any trial or testimony. There are no grounds for setting it aside at this late date.

The court has carefully reviewed this record and plea of guilty not once but several times, and can find no justification in now setting aside defendant's plea of guilty. The court was, at that time, and is now satisfied that the defendant is guilty of the offense charged, and that the defendant knew it and freely pleaded guilty for that reason. The motion to set aside the plea should be denied.

/s/ Hon. James E. Spier
Circuit Judge

SUPPLEMENTAL STATEMENT:

The record discloses that an organization known as the NAACP was interested in this case, on the basis of representations made by the accused, and because of the inflammatory type of newspaper articles that appeared prior to accused arrest. Due credit should be given this organization for its work in bringing before the proper reviewing authorities any cases of alleged injustice where pleas of guilty

may have been through fear or ignorance. The claim of mob intimidation in this case, coupled with the several news articles, certainly justified the organization in aiding, if finally they did, in bringing the claim properly before this court for review.

However, the court is equally certain that the organization in question would not sanction the false and misleading statements used in procuring signatures to petitions for a re-hearing.

After reaching the decision in this case, this court went further, for the purpose of trying to satisfy at least some of the defendant's acquaintances skeptical of the accusation. The complaining witness was finally located out of this court's jurisdiction—having long since moved to a coastal state to get away from the shocking experience and publicity. She again by her sworn statement reiterated and confirmed the attacks by force made upon her, corroborated by all of the facts and details that the defendant admitted to before the court, and also reaffirmed the additional charge originally made, but denied by defendant, pertaining to an oral attempt the only charge denied by defendant at that time. As stated before, this subsequent confirmation had no legal status, but this court desired every check possible even at this late date of the truth or falsity of defendant's original story and plea to this court.

/s/ Hon. James E. Spier
Circuit Judge

Dated: January 15, 1953.

Appendix "E"

Second Opinion of Trial Judge, following Remand, Rehearing, and Taking of Testimony, and denying Motion for New Trial (R. 165-172).

(Filed, May 4, 1954)

Since filing the opinion of this court of January 15, 1953, and the subsequent order based thereon of March 6, 1953, this cause was remanded to this court by an order of October 6, 1953, of the Supreme Court of the State of Michigan for the purpose of taking testimony of witnesses.

On December 28 and 29, 1953, the testimony of all witnesses desired by either the prosecution or the defendant was taken. The defendant was present in person with his counsel at all times and unlimited cross examination was accorded to defendant's counsel.

Defendant himself took the stand but his cross examination by the prosecutor was limited to the sole issue of the claim of intimidation and threats on August 5, 1942, as inducing his confessions and plea of guilty before the court.

Defendant in his testimony for the first time, mentioned by name an officer who he alleged made threatening remarks. In defendant's brief, filed February 25, 1954, he commented on the failure to produce this witness known only as "Charlie" to him. The prosecutor thereupon filed a motion and obtained an order for further hearing, after locating a former policeman named Charlie. The attorney for the defendant objected in writing to the granting of the motion upon the ground that the matter was of minor importance to the decision of the present motion for new trial. This court, believing that threats of the nature testified to by de-

fendant were of such public importance that the truth or falsity of the same should be determined, if possible, therefore granted the motion over counsel's objection.

The brief for defendant also complains that former assistant prosecutor Held was not brought in. Defendant's testimony nowhere recites any hostile acts, words or threats upon the part of Mr. Held.

Again, and on April 1, 1954, the defendant was returned from prison and was present in court for the further taking of testimony. The former patrolman, "Charlie" (Schalm) denied being at the police station at all the evening in question, and denied seeing defendant or threatening him. Schalm and Lieutenant Smith testified that Schalm was on duty on a shift other than the one during which the mistreatment was alleged. The police lieutenant testified there was on August 5, 1942, another police officer on duty, by the name of Charles Ludeman, but that he died in 1949. Defendant then testified again and stated that the "Charlie" (Schalm) in court was not the policeman who threatened him. (It is notable that the defendant quickly and positively ruled out the living "Charlie" after he had heard the testimony concerning the death of the other "Charlie")

The other Charlie was described by the defendant in his testimony as a person having a red face, whose face "stayed red all the time" (114). The lieutenant and the county clerk testified that the deceased "Charlie" (Ludeman) was not of floride complexion but was of medium complexion—if anything on the sallow side.

Every effort has been made by everyone concerned to produce some proof to substantiate any of the material claims of the defendant as to threats as set forth in his affidavit. The two newspaper articles were received in evi-

dence, and the reporter who wrote the first article July 31, 1942, testified that he had no recollection of it but he believed Chief Rosso must have made the statement to him quoted in the article. Chief Rosso died February 2, 1947.

The offense was committed July 30, 1942.

On July 31, 1942, appeared the article referred to, reciting in general that Chief of Police Rosso said half a dozen men, neighbors of the woman, visited the jail the night of July 30th, threatening to avenge the crime. Defendant was arrested five days later, August 5, 1942, and a news story was carried August 6th, re-hashing the previous news story of July 31st and again referring vaguely to "rumblings indicated possible violence from incensed Harrison township acquaintances" (press quotation, not police quotation.) This apparently referred to the incident of the neighbors talking to the chief on the night of the offense, July 30th.

After the extended examination of the defendant, and plea and sentence of August 5, 1942, the first appeal or claim filed with this court, or notice of any kind as to any complaint of defendant as to his plea or sentence, was the October 23, 1947 Motion for new trial, supported by the affidavit of Henderson.

This affidavit and motion did not contain any claim of innocence or any claim of threats or intimidation.

This was followed by a petition filed December 20, 1947, for hearing said motion, and the motion was later argued before the court by the defendant's attorney, Alvin Wanzo, February 9, 1948, carefully considered, and analyzed in a lengthy opinion filed by the court.

On May 15, 1948, defendant's counsel filed a motion for

rehearing of the motion for new trial, which was never brought on.

On June 24, 1952, the present motion and affidavit were filed.

It is hard to believe that any defendant as familiar as this defendant was with court procedure, having been through the entire proceedings in his previous criminal case, including changes of plea, appointment of defense attorney and finally serving his prior prison sentence, would negotiate the preparation and filing of the exhaustive motion and supporting papers for a new trial in 1947 and 1948, *and not raise the claim of innocence or of intimidation* or threats had there been any truth to such claims.

There is every indication that the claim of threats was an after-thought and inspired by the newspaper articles, which were all based on only one conversation some neighbors allegedly had with the chief of police, now deceased, on the night of the offense, and this was some six days prior to defendant's arrest and arraignment. All testimony clearly shows there were no untoward incidents or tension or unusual conditions or gatherings on the night of August 5, 1942.

In view of the testimony now taken before the court, defendant's affidavit of June 17, 1952, now shown to be false in the only allegations that would support the claim of a coerced plea of guilty through threats and intimidation, on which he bases his motion, takes on a peculiar light.

We have:

1. The denial to the officers of any crime.
2. Being told there was a mob outside the jail.
3. Threats to turn him loose to the mob if he did not confess.

4. Being taken out of the jail and led through a tunnel from the jail to the courthouse (there is no tunnel).

5. Various interrogations by officers in the courtroom attempting to get a confession from him.

6. While in the courtroom, the denial of his requests for his brother, or other family member.

7. Being taken to a courtroom window by an officer and shown a "mob" or large number of people on the street, some of them looking up in his direction.

Everyone of these allegations has been denied by several witnesses under oath.

The then sergeant, now Lieutenant Eugene Smith, testified that he, in company with Sergeant Campbell, picked the defendant up at the State Police Post and drove him back to Mt. Clemens. He testified they discussed the offense en route and that defendant admitted it freely (7) (202) (203) and defendant said he only wanted to get it over with, or words to that effect (8). Sergeant Smith testified there was no mob outside and that there was no mention at any time of any mob (11), nor was there any gathering of any people (14) (16).

Lieutenant Smith testified defendant Henderson was very frank in admitting the whole affair (25), and that there was no interrogation by police or anyone in the courtroom, as defendant already had told the entire story, nor did defendant look out any window (203) (205).

The then Sergeant (now Lieutenant) Campbell, testified he heard Chief Rosso ask the defendant if he had an attorney or wanted an attorney and the defendant replied no, he

would like to get it over with as soon as possible (89) (210, 211). He heard the defendant admit the offense and at no time were there any threats of mob violence or violence of any kind. (90) (212, 213). The defendant never was taken to the courtroom window, nor even looked out the window (214, 215), nor was there any questioning of him by officers in the courtroom, nor any need for it. (213).

Every witness involved, who is now available, in any of these delayed charges by the defendant has been called and examined in defendant's presence. The only accused individual actually named now by the defendant is a police officer who is dead, and cannot be produced, and, as previously noted, this deceased officer did not match the defendant's positive description of him. All others were produced and deny every material allegation of the defendant pertaining to any talk of threats or inducements to obtain a plea of guilty. Every witness swore that the defendant freely admitted his guilt from the very first, and throughout the proceedings.

The obvious falsity of some basic allegations in defendant's affidavit, such as: the lengthy interrogation and threats while in the courtroom, to get him to confess (he had already signed a confession in jail, there was no need for further talk); the "mob on the street below" (9) (which defendant now admits did not exist); being led through a tunnel (which never existed and which defendant now admits he was mistaken about) from the jail to the courthouse; all detract from the weight that might otherwise be given his claims regarding threats made to him prior to the courtroom hearing.

Were he taken from the jail to the court through a tunnel it would add credence to his story of the threat of mob violence and unspoken conspiracy on the part of the police

officers to induce a plea of guilty. Likewise the fact that no tunnel existed and that he was walked across and down a wide avenue to the court building, with no mob or gathering of any persons in sight, and the fact that he now admits "I never claimed to have seen a mob", remove the keystone of his carefully built-up picture of secrecy, threats, coerced confession, incommunicado detention, and spiriting from jail to court and back, as claimed in defendant's affidavit.

To return to the night of July 29th and early morning of July 30, 1942, it should be noted this defendant had just procured a job. If he were innocent of any wrongdoing that night, why did he not return to that job and keep up his contact with his newly found and willing (as he claims) sexual outlet? Is it not more logical to assume that, having assaulted and had illicit intercourse with a married woman, he disappeared for a few days, banking on the possibility that the victim would not want to face the disgrace and publicity of making a criminal complaint, which frequently happens, especially in the case of married women with children; and that when he found she had made the complaint, he gave himself up and as he said, "wanted to get it over with as soon as possible?"

Regardless of the great delay in raising the present issues, the court recognizes there are certain features of the case, requiring the closest scrutiny of all testimony of all parties. Those are the rapidity of the disposition of the matter, and the calling of a night session of the court.

As pointed out before, it was not a too unusual procedure twelve years ago to have a night session of court, where all parties including the defendant were anxious to have the matter disposed of promptly. In the present case the defendant at that time apparently expressed the desire to get it over with as soon as possible. The chief of police also desired to have it disposed of quickly. However, as to the

actual arraignment itself, in court, there was nothing hasty. The defendant was examined at length in an atmosphere and surroundings that were quiet and free from any tension or crowd or antagonistic citizens, and questioned by a Judge who did all he could to make sure the defendant knew what he was doing and what defendant wanted to do.

This type of problem is a source of great concern and worry, to the trial judge. He accepts the defendant at face value as he appears before the court. If he appears ill at ease, or worried, or frightened, his statements are not accepted without serious questioning, or further investigation. However, when the defendant, as in this case, has been through the similar court proceedings before, and has asserted and been given his rights, and has every appearance of knowing what he is doing and wants to do, and indicates freedom of thought by denying certain details and correcting the court in others, the judge naturally places more reliance upon the defendant's own representations, appearance and statements. When under such circumstances the defendant tells the court: "I wouldn't change my plea because I know I am guilty; no use trying to run around—trying to fight it", the court believes him, unless there is something to indicate to the court to the contrary.

In the present hearing (December 29, 1953) the defendant, while reciting his sexual experience with the married complainant (defendant himself being married) made out a complete case of adultery against himself and the married woman, who he claims was so completely cooperative after an acquaintanceship of less than one hour, yet he did not indicate any remorse, shame or sense of wrongdoing, and his smug attitude in reciting this sexual adventure (126) did not lend credence in the mind of this court to his present contention that his confession to the police and his admissions to this court on August 5, 1942, were involuntary.

The defendant's self-possession, conduct and demeanor on the stand showed him to be a very intelligent and aggressive personality, keenly alert to his legal rights and defenses, as borne out by his handling of his answers and testimony. He clearly demonstrates a mental capacity that is inherent and not acquired, and which existed equally on August 5, 1942.

These cases, these long delayed pleas, clearly put the courts and judicial administrative systems, and trial judges, in a very difficult position.

Had such a plea or claim as this one, (i.e., a plea induced by threats of mob violence), been presented to this court reasonably soon after sentence, such as even within a few years, the court would certainly have been inclined to give it more credence or favorable consideration, particularly in the case such as this where the only alleged threat not denied under oath is charged to an officer who is now deceased. Had the defendant even written a letter to such effect to the court, prompt investigation would have resulted while all parties were alive, and memories more reliable. No such letters were received by the court. No letters were received by the court clerk except in connection with procuring a copy of the court records in connection with the first motion for a new trial in 1947.

To wait until the lapse of nine or ten years to have the court pass on such a plea, usually means the ultimate freeing of the defendant. After this lapse of time would the victim, a married woman, no longer within the jurisdiction of the court, and perhaps whose child or children are growing up, voluntarily submit all over again to the publicity connected with such an offense?

Defendants in these rape cases appreciate all this, and can weigh the possible gains or disadvantages of raising such claims after a long lapse of time.

If the basis of the motion is true, the motion should be granted, of course, regardless of the subsequent outcome. However, the longer the lapse of time in raising such a claim, the greater the suspicion of its validity and reliability.

It would certainly be a miscarriage of justice to permit a defendant to wait until he is reasonably certain there will be no retrial of his case, and then raise issues which could and should have been promptly raised. Particularly is this true where the affidavit in support of the motion is shown to be false in some of its most important allegations.

Throughout twenty-five years of trial work this court has had no hesitancy in granting a new trial, regardless of lapse of time, when there has been any question of an injustice being done, or a denial of due process. The present case does not fall in either of these groups.

/s/ James E. Spier
Circuit Judge

Dated: May 4, 1954

Appendix "F"

Opinion of Michigan Supreme Court, affirming Order denying New Trial.

(October 3, 1955; published in 343 Mich. 465)

BEFORE THE ENTIRE BENCH.

Boyles, J.

On leave granted the defendant appeals from an order entered in the circuit court for Macomb county denying his motion for a new trial, after he had pleaded guilty and received a life sentence to State prison in 1942 for rape. The principal question for decision is whether, under the circumstances of the case, and in view of the defendant's present claim that his plea of guilty was induced by coercion and fear, his arrest, arraignment, plea of guilty and sentence, all having occurred on the same day, constituted a denial of due process of law under article 14, § 1, of the amendments to the United States Constitution, and article 2, § 16, of the Michigan Constitution (1908). A secondary claim, urged by appellant, is that the proceeding was in violation of section 19 of said article 2, in that he was deprived of the right to a public trial.

On July 30, 1942, a white female over 16 years of age made complaint in writing that the defendant, a Negro, then 25 years of age, did on that day assault and rape her. A warrant was issued and on August 5, 1942, when the defendant arrived at the home of friends in Ypsilanti, having journeyed there from Chicago where he had gone after July 30, he was told that he was wanted by the police and thereupon went to the State police post in that city where he was questioned. He was then taken to the State police

post at Redford where he was met by 2 officers of the police force of the city of Mt. Clemens and taken by them to the jail at that city, where he was registered, fingerprinted and his picture taken. He was placed in a cell, later brought to the office of the chief of police where he was questioned by an assistant prosecuting attorney and signed a typewritten confession. He was then brought before a justice of the peace at the jail, waived preliminary examination, was bound over to the circuit court for trial and bail was fixed. Then he was taken to the county courthouse building which was adjacent. It was then about 10:00 P.M. The circuit judge convened open court, in the presence of the court stenographer, the chief of police, 2 police officers, and 2 assistant prosecuting attorneys. The courtroom doors were open to the public. A meeting of the Mt. Clemens city commission was also being held in the building, but it was not definitely established at what time the persons present thereat left the building.

An information was read to the defendant charging him with rape, and on said arraignment defendant pleaded guilty. In open court he was questioned at length by an assistant prosecutor and by the circuit judge, and a record made. He freely told what had occurred preceding the commission of the crime, of the crime itself in detail, to events thereafter, and admitted his guilt. He was sentenced to life imprisonment and taken to the Oakland county jail, in Pontiac, for the night. He was transferred to the Southern Michigan State prison the following day.

The 2 police officers who had brought the defendant to Mt. Clemens from Redford and who had him in custody in circuit court during the arraignment and sentencing later testified that Chief of Police Rosso, who is now deceased, was afraid of mob violence; however, they denied that these fears were ever communicated to the defendant.

Subsequent proceedings had in the trial court add many facts and circumstances material to a fair understanding and decision of the question in the case, as it now comes to this Court. In October, 1947, more than 5 years after his plea of guilty and sentence, the defendant filed in the circuit court an application for leave to file a delayed motion for a new trial. As grounds for a new trial the defendant at that time claimed that his constitutional rights had been disregarded. Quoting from articles 5 and 6 of the amendments to the United States Constitution, the defendant claimed:

"Under the provisions of these amendments, it makes it mandatory that the respondent be indicted by a grand jury, have a jury trial, and the assistance of legal counsel. * * * under the United States Constitution there is no such thing as a plea of guilty to any crime."

It is significant that nowhere in this application, as ground for a delayed motion for a new trial, filed 5 years after his sentence, or in his affidavit attached, does the defendant deny his guilt, or claim that his plea of guilty was induced by fear or coercion, as he claimed later in another application (to which reference will later be made herein). The defendant mainly relied on the fact that he did not have an attorney to represent him. The circuit judge held a hearing on the application and motion and denied it, filing a lengthy opinion quoting the record made in open court at the time the defendant was sentenced, pointing out that at no time had the defendant requested counsel, that ample opportunity had been afforded the defendant to ask for counsel, and quoting from statements made by the defendant in open court where he had freely told how he had threatened the complaining witness with a knife, had intercourse, and admitted that she was in fear of her life. An-

swering the court at the time of his arraignment after pleading guilty, he said:

"Q. (By the court) You know the seriousness of what you have done?

"A. Somewhat, sir.

"Q. What kind of sentence you think you ought to get?

"A. I am ready for anything that is supposed to come to me.

"Q. What?

"A. I am willing for anything supposed to come to me, sir.

"Q. You know it carries a life sentence, do you?

"A. I didn't know that, no, sir, I didn't know that, sir.

* * *

"Q. The fact it might carry a life sentence, that make any difference in your plea of guilty?

"A. I wouldn't change my plea because I know I am guilty; no use trying to run around—trying to fight it."

In June, 1952, 10 years after his sentence, the defendant filed a second application for leave to file a delayed motion for a new trial, claiming for the first time that his plea of guilty was made following a threat of mob violence by persons gathered outside the court building at the time, and for the first time claiming innocence. Attached to his affidavit were copies of newspaper articles reporting the crime and making reference to mob violence. However, we have nothing to show that these articles were brought to the defendant's knowledge or attention prior to his plea of guilty and sentence. The defendant's affidavit that he was

taken from the jail to the courtroom through a tunnel was refuted—there was no such tunnel. His statement that he was taken to a window in the courtroom and shown a mob was also denied as well as refuted by the testimony of witnesses at the hearing on this motion. There was no such window from which a mob could have been seen. His statement that he was told at the jail that a mob had gathered was refuted by all of the officers at the jail, in testimony taken by the court at the hearing held in open court on said application and motion. Other accusations, obviously conceived in support of said motion 10 years after his conviction, were definitely refuted by witnesses sworn at said hearing. Again, the trial court filed a lengthy opinion and in March, 1953, the court entered an order denying the motion. On June 8, 1953, this Court entered an order denying an application by the defendant for leave to appeal from said order. However, the attorney general of the State filed here a motion to set aside our order denying leave to appeal and asking that this Court remand the cause to the court below for the purpose of taking testimony in the trial court from witnesses who might have knowledge of the truth or falsity of the defendant's assertions. We entered an order remanding the cause to the lower court where a hearing was held and testimony taken. The defendant was there in court in person and represented by counsel, testified, and was allowed full cross-examination of the witnesses sworn. Those proceedings have been certified to this Court in full and are now in the typewritten record here, with a further opinion of the circuit judge filed May 4, 1954. The trial court again denied the motion for a new trial. On July 2, 1954, we granted the defendant leave to appeal from this final order denying a new trial, nothing having been filed in opposition to the defendant's application for leave to appeal. The appeal has been submitted, on a typewritten record and briefs filed by the appellant, which we have accepted without being printed, and a printed brief filed by the people.

It is not necessary to encumber the opinion with further details of all the facts and circumstances. A careful examination of the record before us leaves no room for doubt but that the defendant is guilty of the crime as charged. Appellant's claim in seeking to set aside his plea of guilty and his sentence, and for a new trial, seems to be that, under the circumstances, he was denied due process of law because the sentencing court allowed this entire matter, from arrest to sentence, to be concluded in 1 day, obviously relying on DeMeerleer v. Michigan, 329 U.S. 663. In support of his claim, the defendant now asserts, after this 10-year delay, that his plea of guilty was induced by coercion and fear. In view of the Quicksall Case, handed down by the United States supreme court in 1950 and later referred to herein, the defendant apparently does not press his original claim that due process of law was denied him because his plea was accepted without having been provided an attorney. He did not ask for one.

Before he could depend on any claim of mob violence or fear, the defendant freely admitted his guilt to the police officers when arrested and before he was taken into court. He makes no showing that his first confession was induced by promises, threats, coercion, intimidation or fear. His plea of guilty and his admissions made in open court as to his guilt and the manner in which the crime had been committed followed in detail his earlier confession to the police. The defendant claims he was put in fear, and intimidated, when he was taken into court, notwithstanding the obvious fact that he had already freely admitted his guilt, at a time when such claims could not have been true. The defendant's present unsupported claims, made for the first time 10 years after sentence, and completely refuted by the testimony of witnesses before the court at the hearing of his delayed motion for a new trial, are not convincing. Nor was the defendant then an innocent young man unfamiliar

with court proceedings. When the crime of rape was committed he was 25 years of age. In 1936 he had been convicted of the crime of robbery and sentenced to State prison. He learned then the court procedure when he first pleaded guilty, later changed his plea and was afforded an attorney, on whose advice he again pleaded guilty and was sentenced. He had been married, and separated from his wife. He had also been arrested in Cleveland on a charge of statutory rape, but was released without a determination as to his guilt.

In *DeMeerleer v. Michigan, supra*, the defendant was 17 years of age, the sentencing court did not explain the consequences of his plea of guilty, and the defendant was confused as to the effect of a plea of guilty. In contrast, the defendant in the case at bar was fully advised of the consequences, told by the court that he might be given a life sentence, and in effect the defendant told the court that he did not desire counsel or delay, saying that "I wouldn't change my plea because I know I am guilty; no use trying to run around—trying to fight it." He had been through quite a similar situation in court in 1936 when he pleaded guilty to robbery in the recorder's court in Detroit. He knew the effect of his plea, in contrast to the situation in the DeMeerleer Case.

In the sentencing court, and again in this Court, the defendant has been given every opportunity to substantiate his claim of lack of due process, and his request for a new trial. We have obtained the full record and carefully reviewed it, and examined the circumstances attending each step from the time of the commission of the crime to the final submission of the defendant's appeal to this Court. While we are not in sympathy with the course followed in the trial court, we entertain no doubt as to the defendant's guilt, and we conclude, from a thorough review of all the

circumstances attending the defendant's arrest, concluding with his sentence to State prison, that the fact that under the circumstances of this case these proceedings all took place in 1 day, with the haste obviously sought by or concurred in by the defendant, does not establish that justice requires that the defendant now be granted a new trial. We find no merit in the defendant's belated claim that his plea of guilty was coerced or induced by intimidation or fear. No other assertions have been made, either in the lower court or here, of any irregularities in any of the proceedings, up to the present time.

The circumstances of this case closely parallel the situation that came before the United States supreme court from this State in 1950, where that court, in an opinion delivered by Mr. Justice Frankfurter, concluded:

"To invalidate a plea of guilty the prisoner must establish that 'for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement.' *Foster* v. *Illinois*, 332 US 134, 137; see *Gibbs* v. *Burke*, 337 US 773, 781. Here petitioner's claim that the consequences of his plea of guilty had been misrepresented was disbelieved by the tribunal especially qualified to sit in judgment upon its credibility. See *Wade* v. *Mayo*, 334 US 672, 683-84. In the light of what emerged in this proceeding upon a scrutiny of what took place before the same judge 10 years earlier, when petitioner's plea of guilty was tendered and accepted, it would stultify the due process clause to find that any right of the petitioner was infringed by the sentence which he incurred. *Foster* v. *Illinois*, *supra* at 138; *Bute* v. *Illinois*, 333 US 640, 670-74." *Quicksall* v. *Michigan*, 339 US 660, 666.

As to defendant's second claim that under the mandate in section 19 of article 2 of the amendments to the United

States Constitution he was deprived of the right to a speedy and public trial, the answer is obvious. There is such a proceeding in the law as a plea of guilty to the commission of a crime, and one who pleads guilty is not constitutionally entitled to a trial to determine his guilt, unless his plea of guilty is refused by the court, or is first set aside.

The defendant freely, voluntarily and understandingly pleaded guilty to the crime of rape, without coercion or intimidation, and the order denying the motion for a new trial is affirmed.

MAY 1 1956
HAROLD B. WILLEY, CLERK

Supreme Court of the United States

OCTOBER TERM, 1955

No. 590, Misc.

JAMES HENDERSON,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

BRIEF AMICUS CURIAE OF THE METROPOLITAN DETROIT BRANCH, AMERICAN CIVIL LIBERTIES UNION

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INTEREST OF AMICUS CURIAE

This brief *amicus curiae* is filed pursuant to Rule 42, Rules of the Court, with the consent of the parties, filed simultaneously herewith.

Because the issues raised in this case bear directly upon the constitutional right of persons accused of crime to the assistance of counsel where necessary to secure a fair hearing, we respectfully present our views on this important

phase of the administration of justice. Of particular interest is the question of whether the Michigan Rule as applied in the instant case is in conflict with the due process provision of the Fourteenth Amendment as construed by this Court.

REASON FOR GRANTING THE WRIT

The writ should be granted to resolve an apparent conflict between the application of the Michigan Rule[1] in this type of case and applicable decisions of this Court. *Uveges v. Pennsylvania,* 335 U. S. 437; *De Meerleer v. Michigan,* 329 U. S. 663; *Rice v. Olson,* 324 U. S. 786; *Pennsylvania ex rel. Herman v. Claudy,* — U. S. —, 76 S. Ct. 223.

The essence of the Michigan rule is that an accused forfeits his right to counsel by a plea of guilty. *In re Elliott,* 315 Mich. 662 at 668.[2]

We believe that under the circumstances disclosed by the record, application of the Michigan rule in the instant case denied petitioner a fair hearing in contravention of the due process mandate of the Fourteenth Amendment. The expressed zealous regard of this Court for due observ-

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[1] *People v. Williams,* 225 Mich. 133; *People v. Crandell,* 270 Mich. 124; *In re Elliott,* 315 Mich. 662 (cert. den. 330 U. S. 841); *People v. Coates,* 337 Mich. 56 (cert. den. 346 U. S. 840); and see *3 A. L. R.* 2d, 1073-1074 for a discussion of the Michigan rule.

[2] The court held that the provision of the Michigan Constitution, Art. II, Sec. 19, securing to an accused the right to have counsel for his defense, is merely a guaranty of the right to employ and be represented by counsel, and does not mean he shall have counsel at public expense. With respect to a statutory provision permitting the appointment of counsel for indigent defendants at public expense, the court reiterated the Michigan rule, as follows: "* * * as a rule, to which, of course, there may be exceptions (the statute) cannot be invoked by an accused until after plea *and not at all under a plea of guilty.*" (Our emphasis.)

ance of the safeguards of the Fourteenth Amendment in the enforcement of a State's penal code (*Quicksall v. Michigan*, 339 U. S. 660, 665) provides the basis for issuance of the writ, and the strong probability that continued employment of the rule will result in grave injustices and serious deviations from the constitutional mandate indicates the need therefor.

THE RIGHT TO COUNSEL WAS NOT WAIVED

Since the right to counsel is "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U. S. 319 at 325, it is not suprising that there is a presumption against waiver of this fundamental right. *Johnson v. Zerbst*, 304 U. S. 458; *Glasser v. United States*, 315 U. S. 60

In concluding that petitioner was not entitled either to be advised of his right to the assistance of counsel or to have counsel assigned to assist him, the Michigan Supreme Court noted that petitioner was an adult with a past criminal record, that he made no request for counsel,[3] and that "in effect" he had told the court he did not desire counsel by stating that "I wouldn't change my plea because I know I am guilty; no use trying to run around—trying to fight it" (343 Mich. 465 at 472).

Evaluated in the light of the presumption against waiver of the right to counsel, it is respectfully submitted that the foregoing facts fall far short of supporting the court's

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[3] In so finding the court apparently overlooked or disregarded petitioner's uncontradicted testimony that he had questioned the justice of the peace before whom he had been arraigned as follows:

"I asked him why they wouldn't let me call my brother and why wasn't it possible to have an attorney. He told me there was nothing he could do; his hands were tied" (CR—40).

determination that petitioner had waived his right to counsel. In effect if not in fact, the court drew a conclusive implication of waiver from petitioner's plea of guilty. In commenting upon a similar situation in *Rice v. Olson*, 324 U. S. 786, this Court held that the lower court's action was

> "* * * the equivalent of holding that one who voluntarily pleads guilty without the benefit of counsel has thereby competently waived his constitutional right to counsel, even though he may have sorely needed and been unable to obtain legal aid. A defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary. It is enough that defendant charged with an offense of this character is incapable adequately of making his defense, that he is unable to get counsel, and that he does not intelligently and understandingly waive counsel."

In *Pennsylvania ex rel. Herman v. Claudy*, — U. S.—, 76 S. Ct. 223, it appeared that at the time of sentence the petitioner told the judge that he was guilty and said, "I throw myself at the mercy of the court * * *"; that he had had previous experience in a criminal case in which he had pleaded guilty, and that he did not file his petition for relief until eight years after sentence. This Court held that petitioner's statements were not in themselves sufficient to disprove the charge that he had been wrongfully denied the assistance of counsel; that "(i)t is entirely possible that petitioner's prior confession caused him, in the absence of counsel, to enter the guilty plea"; that "the mere fact that petitioner had, without the benefit of counsel, pleaded guilty to an offense 2 years before "did not prove he was capable of defending himself; and that petitioner was not to be denied relief because of his delay in filing habeas

corpus proceedings. "The sound premise upon which these holdings (*Uveges v. Pennsylvania*, 335 U. S. 437; *Palmer v. Ashe*, 342 U. S. 134) rested is that men incarcerated in flagrant violation of their constitutional rights have a remedy."

We therefore respectfully submit that petitioner did not waive his right to the assistance of counsel, and that the trial court's failure to advise him of this right or to provide him with counsel, under the admitted circumstances of the case, deprived petitioner of his constitutional right to a fair hearing.

QUICKSALL IS NOT CONTROLLING

In *Quicksall v. Michigan*, 339 U. S. 660, this Court held that to invalidate a plea of guilty, the prisoner must establish that "for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement." The ingredient found missing in *Quicksall* is strikingly present in the instant case.

What characterized De Meerleer[4] most significantly was the element of "quick justice" without benefit of counsel. If the time interval between arrest and sentence in De Meerleer (1 day) may properly be designated "quick justice", the speed with which petitioner was sentenced to life imprisonment could aptly be characterized as "blitz justice" approximating judicial automation. De Meerleer at least had the benefit of a public hearing during regular court hours. Petitioner was arraigned and sentenced in a court

[4] *De Meerleer v. Michigan*, 329 U. S. 663.

hastily convened at night (1020 p. m.) at which no member of the public was present.[5]

The Michigan Supreme Court sought to bring petitioner's case within *Quicksall* on the facts. Thus Quicksall was 44 years old at the time of the crime and had been married and divorced twice. Petitioner, the court pointed out, was 25 at the time he was sentenced, and "had been married and separated from his wife." Quicksall had served prison terms in Ohio and Michigan. Petitioner had served a term for robbery in Michigan and "had also been arrested in Cleveland on a charge of statutory rape, *but was released without a determination of his guilt.*" (Emphasis supplied.) Quicksall had filed his petition for a new trial almost 10 years after sentence. Petitioner had filed his second motion 10 years after sentence.

The dissimilarities between the two cases, however, are more striking than the similarities. Quicksall's hearing was held during regular day time court hours and there was no claim of "quick justice." Petitioner's hearing was held at night when no member of the public was or could have been expected to be present, and the entire proceedings from arrest to life sentence occurred within a period of four hours. No motivations on the part of the prosecuting officers or the trial judge for speed and a hearing at night existed in *Quicksall.* In petitioner's case, the police officers, asserting fear of mob violence, rushed the proceedings along (343 Mich. 468). The trial judge, in denying petitioner's second motion for a new trial, explained the expedition of the proceedings on the ground that if the

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[5] *People v. Coates*, 337 Mich. 56 (cert. den. 346 U. S. 840) suggests that the procedure adopted in petitioner's case was not an isolated instance. Coates was also a Negro charged with rape on complaint of a white woman.

accused had been permitted to talk with other criminals in the jail, he might have been talked into fighting the case regardless of his guilt or innocence, *thus causing more expense to the tax payers*[6] (CR 13).

We therefore respectfully submit that the decision of this Court in *Quicksall v. Michigan, supra,* is not controlling in the instant case and does not support denial of relief to petitioner by the Michigan Supreme Court.

PETITIONER WAS DENIED A PUBLIC HEARING

A Michigan statute (C. L. '48, Sec. 604.5) provides:

> The sittings of every court within this state shall be public, and every citizen may freely attend the same."

As previously pointed out, petitioner's hearing was held at night, long after regular court hours, at a time when no member of the public was or could have been expected to be present.

The salutary effect of the presence of the public at court hearings has often been noted and commented upon. *In re Oliver,* 333 U. S. 257, at 270-272. Cited benefits are that key witnesses unknown to the parties may attend, come forward and give important testimony; that the public may see that the accused is fairly dealt with and not unjustly condemned; and that the presence of interested spectators may keep the triers of the accused keenly alive to their responsibilities.

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[6] Cf. *Pennsylvania ex rel. Herman v. Claudy,* — U. S. —, 76 S. Ct. 223 at 224.

But there are further and more compelling reasons why hearings should be public. So that people will have confidence in their courts and be satisfied that right is being done, courts must not only do justice; they must satisfy the appearance of justice. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123 at 172; *In re Murchison*, 349 U. S. 133 at 136; *Offutt v. United States*, 348 U. S. 11 at 14.

In the light of these requirements, it cannot be said that petitioner had either a public hearing or a fair hearing. The very absence of the public during the night session of court (besides petitioner, only police officers, the prosecutor, the judge and the court reporter were present) considered in connection with the paralyzing nature of the charge, could well have convinced petitioner that his situation was hopeless, that he might as well get it over with as soon as possible, and, in his own words "• • • no use trying to run around—trying to fight it" (343 Mich. at 472).

On the basis of the foregoing, we earnestly contend that petitioner was denied a fair and public hearing and that he is being deprived of his liberty without due process of law contrary to the requirements of the Fourteenth Amendment.

• • • • •

Both the trial judge (CR 13) and the Michigan Supreme Court (343 Mich. at 473) deplored the procedures employed in connection with petitioner's conviction. Both concluded, nevertheless, that petitioner had not been deprived of his constitutional rights. This technique has been the subject of trenchant comment:

> "Judges march at times to pitiless conclusions under the prod of remorseless logic which is sup-

posed to leave them no alternative. They deplore the sacrificial rite. They perform it, nonetheless, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity."

Cardozo, The Growth of the Law (1924), Yale Univ. Press, p. 66.

CONCLUSION

We respectfully urge that petitioner's application for a writ of certiorari be granted.

Respectfully submitted,

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